No. 14-916

Title:	Kingdomware Technologies, Inc., Petitioner
	v.
	United States
Docketed:	January 30, 2015
Linked with 14A519	
Lower Ct:	United States Court of Appeals for the Federal Circuit
Case Nos	(2013-5042)
Decision Date:	June 3, 2014
Rehearing Denied:	September 10, 2014

Questions Presented

--Date--	------Proceedings and Orders----------
Nov 14 2014	Application (14A519) to extend the time to file a petition for a writ of certiorari from December 9, 2014 to January 8, 2015, submitted to The Chief Justice.
Nov 18 2014	Application (14A519) granted by The Chief Justice extending the time to file until January 8, 2015.
Dec 22 2014	Application (14A519) to extend further the time from January 8, 2015 to January 29, 2015, submitted to The Chief Justice.
Dec 29 2014	Application (14A519) granted by The Chief Justice extending the time to file until January 29, 2015.
Jan 29 2015	Petition for a writ of certiorari filed. (Response due March 2, 2015)
Feb 2 2015	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for petitioner Kingdomware Technologies, Inc.
Feb 25 2015	Order extending time to file response to petition to and including April 1, 2015.
Mar 2 2015	Brief amicus curiae of American Legion filed.
Mar 2 2015	Brief amici curiae of National Veteran Small Business Coalition, et al. filed.
Mar 20 2015	Order further extending time to file response to petition to and including May 1, 2015.
May 1 2015	Brief of respondent United States in opposition filed.
May 18 2015	Reply of petitioner Kingdomware Technologies, Inc. filed.
May 19 2015	DISTRIBUTED for Conference of June 4, 2015.
Jun 2 2015	Rescheduled.
Jun 8 2015	DISTRIBUTED for Conference of June 11, 2015.
Jun 15 2015	DISTRIBUTED for Conference of June 18, 2015.
Jun 22 2015	Petition GRANTED.
Jul 28 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 18, 2015.
Jul 28 2015	The time to file respondent's brief on the merits is extended to and including September 29, 2015.
Aug 4 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither

	party, received from counsel for the petitioner.
Aug 5 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent
Aug 18 2015	Joint appendix filed (Statement of costs filed).
Aug 18 2015	Brief of petitioner Kingdomware Technologies, Inc. filed.
Aug 24 2015	Brief amicus curiae of Steven J. Koprince filed.
Aug 25 2015	Brief amicus curiae of American Legion filed.
Aug 25 2015	Brief amici curiae of National Veteran Small Business Coalition, et al. filed.
Aug 25 2015	Brief amici curiae of Iraq and Afghanistan Veterans of America filed.
Aug 25 2015	Brief amici curiae of Members of Congress filed.
Aug 25 2015	Brief amicus curiae of The Federal Circuit Bar Association filed.\
Aug 25 2015	Brief amici curiae of Paralyzed Veterans of America, et al. filed.
Sep 9 2015	SET FOR ARGUMENT on Monday, November 9, 2015
Sep 10 2015	Record requested from the U.S.C.A. Federal Circuit.
Sep 10 2015	Record requested from the U.S.C.A. Federal Circuit is electronic and located on PACER.
Sep 29 2015	Brief of respondent the United States filed.
Oct 2 2015	CIRCULATED
Oct 27 2015	Reply of petitioner Kingdomware Technologies, Inc. filed. (Distributed)
Nov 4 2015	This case is removed from the argument calendar for Monday, November 9, 2015. The parties are directed to file supplemental briefs addressing the following question: "Whether the Department of Veterans Affairs procurements at issue in this case have been fully performed, and if so, whether the case is moot. The briefs, limited to 6,000 words each, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before Friday, November 20, 2015. Reply briefs, not to exceed 3,000 words each, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before Tuesday, December 1, 2015.
Nov 20 2015	Letter from the Solicitor General proposing a lodging consisting of a declaration by Corydon Ford Heard III, Associate Deputy Assistant Secretary for Procurement Policy, Systems, and Oversight within the Office of Acquisition and Logistics of the United States Department of Veterans Affairs.
Nov 20 2015	Supplemental brief of petitioner Kingdomware Technologies, Inc. filed. (Distributed)
Nov 20 2015	Supplemental brief for the United States filed. (Distributed)
Nov 20 2015	Letter from counsel for the petitioner proposing a lodging consisting of a declaration by Timothy Barton, the Chief Executive Officer of Kingdomware.
Dec 1 2015	Supplemental reply brief of respondent United States filed. (Distributed)
Dec 1 2015	Supplemental reply brief of petitioner Kingdomware Technologies, Inc. filed. (Distributed)
Dec 23 2015	SET FOR ARGUMENT ON Monday, February 22, 2016
Jan 15 2016	CIRCULATED.
Feb 22 2016	Argued. For petitioner: Thomas G. Saunders, Washington, D. C. For respondent: Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Mar 25 2016	The Clerk has approved petitioner's proposal to lodge copies of the Declaration of Timothy Barton. Lodging distributed.
Mar 25 2016	The Clerk has approved respondent's proposal to lodge copies of the Declaration of Corydon Ford Heard III. Lodging distributed.

14-916

No. 14-

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IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The Federal Circuit, however, relied on a prefatory clause in the statute to limit the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kingdomware Technologies, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

INTRODUCTION 5

STATEMENT 7

A. Overview Of Government Procurement 8

B. Amendments To The Small Business Act For Service-Disabled Veterans 10

C. The 2006 Veterans Act 11

D. *Aldevra* Bid Protests 16

E. Prior Proceedings 19

REASONS FOR GRANTING THE PETITION 23

I. THE FEDERAL CIRCUIT'S DECISION DISREGARDS THE PLAIN LANGUAGE OF § 8127(d) AND DRAINS IT OF THE MANDATORY FORCE CONGRESS INTENDED 23

A. The Decision Contravenes This Court's Teaching That "Shall" Is Mandatory 23

TABLE OF CONTENTS—Continued

Page

B. The Decision Wrongly Transforms Congress's Prefatory Language Into A Loophole 25

C. The Decision Misreads The Context And Legislative History Of The 2006 Veterans Act, Which Confirm That Congress Mandated Use Of The Rule Of Two 28

D. The VA's Own Regulations Support The Mandatory Nature Of The Rule Of Two 30

E. Statistics Concerning The VA's Performance Do Not Excuse Its Failure To Comply With § 8127(d) 32

II. THE QUESTION PRESENTED IS IMPORTANT TO THE NATION'S VETERANS 33

A. The Federal Circuit's Flawed Interpretation Sets A National Rule 33

B. The Decision Below Affects Billions Of Dollars In Contracting Opportunities For Veteran-Owned And Service-Disabled Veteran-Owned Small Businesses 34

CONCLUSION 37

APPENDIX A: Opinion of the United States Court of Appeals for the Federal Circuit, June 3, 2014 ..... 1a

APPENDIX B: Opinion of the United States Court of Federal Claims, Nov. 27, 2012 ..... 33a

TABLE OF CONTENTS—Continued

Page

APPENDIX C: Order of the United States Court of Appeals for the Federal Circuit denying rehearing and rehearing en banc, Sept. 10, 2014 ..... 73a

APPENDIX D: Judgment of the United States Court of Federal Claims, Dec. 18, 2012 ..... 75a

APPENDIX E: Statues and Regulations

15 U.S.C.

§ 644(g) 77a

§ 657f 80a

38 U.S.C.

§ 8127 ..... 81a

§ 8128 ..... 89a

48 C.F.R. subpt. 819.70

§ 819.7001 ..... 89a

§ 819.7002 ..... 90a

§ 819.7003 ..... 90a

§ 819.7004 ..... 91a

§ 819.7005 ..... 91a

§ 819.7006 ..... 92a

§ 819.7007 ..... 93a

§ 819.7008 ..... 94a

§ 819.7009 ..... 95a

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 23

Anderson v. *Yungkau*, 329 U.S. 482 (1947) 23

Association of American Railroads v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977) 26

Boone v. *Lightner*, 319 U.S. 561 (1943) 5

Centech Group, Inc. v. *United States*, 554 F.3d 1029 (Fed. Cir. 2009) 18

Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 20, 30, 31

City of Arlington v. *FCC*, 133 S. Ct. 1863 (2013) 30

CMS Contract Management Services v. *Massachusetts Housing Finance Agency*, 745 F.3d 1379 (Fed. Cir. 2014), *petition for cert. filed*, No. 14-781 (U.S. Jan. 5, 2015) 18

District of Columbia v. *Heller*, 554 U.S. 570 (2008) 26

Florentine v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239 (2d Cir. 1965) 26

Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 24

Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428 (2010) 34

Lopez v. *Davis*, 531 U.S. 230 (2001) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Aldevra, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 16, 17, 18, 19, 31

Matter of Aldevra, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) 17, 19

Matter of Kingdomware Technologies, 2012 WL 1942256 (Comp. Gen. May 30, 2012). 19

Matter of Kingdomware Technologies—Reconsideration, 2012 WL 6463498 (Comp. Gen. Dec. 13, 2012) 18

NWF v. *Marsh*, 721 F.2d 767 (11th Cir. 1983) 26

Sebelius v. *Cloer*, 133 S. Ct. 1886 (2013) 34

Sharp Electronics Corp. v. *McHugh*, 707 F.3d 1367 (Fed. Cir. 2013) 8

United States ex rel. Siegel v. *Thoman*, 156 U.S. 353 (1895) 24

United States v. *Eurodif S.A.*, 555 U.S. 305 (2009) 34

United States v. *Rodgers*, 461 U.S. 677 (1983) 23, 24, 25

Wos v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013) 31

Wyeth v. *Levine*, 555 U.S. 555 (2009) 31

Wyoming Outdoor Council v. *Untied States Forest Service*, 165 F.3d 43 (D.C. Cir. 1999) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Yazoo & Mississippi Valley Railroad v. *Thomas*, 132 U.S. 174 (1889) 26

STATUTES AND REGULATIONS

15 U.S.C.
§ 631(a) 9
§ 637(a) 9
§ 644(g) 4, 5, 10
§ 644(g)(1)(A) 9
§ 644(g)(1)(A)(ii) 10
§ 644(g)(1)(B) 9
§ 657a(b) 9
§ 657f 4, 5
§ 657f(a) 11
§ 657f(b) 11, 25

28 U.S.C.
§ 1254(1) 2
§ 1295(a)(3) 34
§ 1491 34
§ 1491(b)(1) 19, 33 34

31 U.S.C. § 3554(b) 18

38 U.S.C.
§ 8127 ..... 4, 12
§ 8127(a) ..... *passim*
§ 8127(a)(3) 12
§ 8127(b) ..... *passim*
§ 8127(c) ..... *passim*
§ 8127(d) ..... *passim*
§ 8127(e) 14
§ 8127(f) 14
§ 8127(g) 14

TABLE OF AUTHORITIES—Continued

Page(s)

§ 8127(j) 14
§ 8128 ..... 4, 12
§ 8128(a) 15

41 U.S.C.
§ 134 13
§ 3301(a) 8

Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, 126 Stat. 1165 14

Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 11

Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864 14

Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 ..... *passim*

Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 14

Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 10

TABLE OF AUTHORITIES—Continued

Page(s)

48 C.F.R.
ch. 1 8
ch. 8 8
pt. 19 ..... 9, 10, 17
subpt. 819.70 4
§ 1.101 8
§ 8.402(a) 8
§ 8.404(a) 8, 10, 17
§ 8.405-5 10
§ 19.502-2(b) 9
§ 33.101 16
§ 33.103 16
§ 33.104 16
§ 33.105 16
§ 810.001 14
§ 813.106 15
§ 819.7005 22
§ 819.7005(a) 15, 31
§ 819.7006 22
§ 819.7006(a) 31
§ 819.7007(a) 15
§ 819.7007(b) 16
§ 819.7008(a) 15
§ 819.7008(b) 16

VA Acquisition Regulation, 74 Fed. Reg. 64,619 (Dec. 8, 2009) 15, 22, 31, 35

LEGISLATIVE AND EXECUTIVE MATERIALS

H.R. Rep. No. 106-206 (1999) 10

H.R. Rep. No. 109-592 (2006) 11, 12, 14, 29, 36

H.R. Rep. No. 110-785 (2008) 14

TABLE OF AUTHORITIES—Continued

Page(s)

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H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 109th Cong. (2005) 12, 29

The State of Veterans' Employment: Hearing before the H. Comm. on Veterans' Affairs, 108th Cong. (2003) 11

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TABLE OF AUTHORITIES—Continued

Page(s)

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IN THE

Supreme Court of the United States

No. 14-

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kingdomware Technologies, Inc. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The Federal Circuit entered judgment on June 3, 2014 (App. 1a), and denied Kingdomware's timely peti-

tion for rehearing en banc on September 10, 2014 (App. 73a-74a). The Chief Justice granted two extensions of time to file this petition for a writ of certiorari, ultimately extending the deadline to January 29, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision at issue states:

> (d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d). The subsections that immediately precede this provision state:

> (a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—
>
> > (A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans

who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business

concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(a)-(c). The appendix reproduces 15 U.S.C. §§ 644(g) and 657f, 38 U.S.C. §§ 8127-8128, and 48 C.F.R. subpart 819.70. App. 77a-95a.

INTRODUCTION

The United States has long recognized a special obligation to protect and reward those who "drop their own affairs to take up the burdens of the nation" in military service. *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). This case involves a series of legislative actions, many taken during the nation's most recent armed conflicts, to "honor[] the extraordinary service rendered to the United States by veterans" by ensuring that veterans have a fair opportunity to participate in contracting with the federal government. Exec. Order No. 13,360, 3 C.F.R. 231 (2005). Over a vigorous dissent, the Federal Circuit decision in this case gutted the most important of those provisions. This Court's review is needed to restore the proper interpretation of the statute, which affects thousands of veteran-owned small businesses.

The story behind the decision to adopt the statute at issue began in 1999 when Congress amended the Small Business Act to require the government to set annual goals for awarding contracts to small businesses owned by veterans with service-related disabilities. 15 U.S.C. § 644(g). After nearly every agency—including the Department of Veterans Affairs ("VA")—failed to meet those goals, Congress again amended the Small Business Act in 2003 to permit, but not require, contracting officials to restrict competition for some contracts to small businesses owned by service-disabled veterans. *Id.* § 657f (contracting officers "may award" contracts using limited competition).

In 2006, when that too proved inadequate, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 ("2006 Veterans Act"), as stand-alone legisla-

tion separate from the Small Business Act. The 2006 Veterans Act focuses solely on the VA and provides that it "*shall* award" contracts on the basis of competition restricted to veteran-owned small businesses whenever the contracting officer reasonably expects that two or more such businesses will bid and that the award can be made at a "fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d) (emphasis added). The only exception to this VA-specific mandate to restrict competition to veteran-owned small businesses provides that a contracting officer "*may* award" certain small contracts directly to a veteran-owned small business using non-competitive procedures. *Id.* § 8127(b), (c) (emphasis added).

A divided panel of the Federal Circuit, however, held that the "mandate" in § 8127(d) applies only when the VA, in its discretion, thinks using the mandate would help the VA meet its annual contracting goals. To reach this conclusion, the panel majority relied on § 8127(a), which requires that the VA Secretary set annual goals for awarding contracts to veteran-owned small businesses, and a prefatory clause in § 8127(d), which states that contracting officers shall award contracts on the basis of restricted competition "'for purposes of meeting the [annual] goals.'" App. 20a. The majority viewed a mandatory mechanism for achieving the Department's annual goals as inconsistent with the Secretary's discretion to set the goals. *Id.*

That holding is deeply flawed. It fails to give effect to § 8127(d)'s plain language and disregards this Court's teaching that "shall" is the language of command, not discretion. It also improperly imbues the prefatory clause of § 8127(d) with an operative force Congress never intended; properly construed, the prefatory clause explains the purpose of the mandate but

does not limit or qualify it. Moreover, the majority's holding rests on the false premise that agency-wide goals are incompatible with a mandatory mechanism for satisfying or even surpassing the goals. Finally, the majority's results-oriented view that the mandate is discretionary "as long as" the annual goals are met leaves the statute potentially unworkable in practice, particularly in circumstances in which the agency fails to meet the goals it sets for itself.

The Federal Circuit hears all appeals from lawsuits against the United States challenging the award of government contracts. The panel majority's atextual construction thus governs VA contracting throughout the country, affecting thousands of veteran-owned and service-disabled veteran-owned small businesses and billions of dollars of VA contracts. If the decision below stands, the nation's veteran-owned small businesses will have far fewer opportunities to contract with the VA than Congress intended. This Court's review is warranted to require the VA to comply with Congress's command.

STATEMENT

The "Rule of Two" is a government contract policy that restricts competition for specified types of government contracts to particular types of businesses when there is a reasonable expectation that two or more such businesses will submit a bid and that the contract can be awarded to one of them at a fair price that offers best value to the United States. This case involves the Rule of Two provision in 38 U.S.C. § 8127(d), which applies to veteran-owned small businesses contracting with the VA.

A. Overview Of Government Procurement

1. Congress has established a general policy that government contracts be awarded based on "full and open competition" through competitive bidding procedures. 41 U.S.C. § 3301(a). The policies and procedures that apply to such acquisitions are set forth in the Federal Acquisition Regulation, 48 C.F.R. ch. 1 ("FAR"). Individual agencies may also "implement or supplement" the FAR with agency-specific regulations. 48 C.F.R. § 1.101. The regulations specific to VA procurements are known as the Veterans Affairs Acquisition Regulation. *Id.* ch. 8.

In some cases, a contracting officer may satisfy the "full and open competition" requirement by purchasing goods or services under a pre-arranged government-wide contract, called a "Federal Supply Schedule" ("FSS"). 48 C.F.R. § 8.404(a). An FSS requires a supplier to commit to "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." *Id.* § 8.402(a). The schedules are typically negotiated by the General Services Administration and are intended to provide contracting officers with a "simplified process for obtaining commercial supplies and services." *Id.* FSS suppliers publish a list of "the items offered pursuant to [the] base contract, as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). "Individual agencies issue purchase orders under the base contract as needed." *Id.*

2. Congress often establishes alternative procurement procedures when unfettered open competition would not achieve its ends. For example, the Small Business Act reflects a congressional determination that the nation's economic "security and well-being

cannot be realized unless the actual and potential capacity of small businesses is encouraged and developed," and that doing so requires that small businesses receive "a fair proportion of the total purchases and contracts ... for the Government." 15 U.S.C. § 631(a).

The Small Business Act requires the President to establish annual government-wide goals for the percentage of contracts awarded to small businesses in general and to particular types of small businesses. 15 U.S.C. § 644(g)(1)(A). In turn, each agency must set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses. *Id.* § 644(g)(1)(B).

Part 19 of the FAR implements the Small Business Act by, among other things, creating procedures to "set aside" some contracts for exclusive participation by small businesses. 48 C.F.R. pt. 19. The principal set-aside mechanism requires a contracting officer to limit competition for a contract to small businesses if the officer has a reasonable expectation that two or more such businesses will submit a bid and that the contract can be awarded to one of them at a fair price. *Id.* § 19.502-2(b). Restricting competition under those circumstances is known generally as applying a "Rule of Two." However, the government-wide set-asides in FAR part 19 are unrelated to the 2006 Veterans Act and the distinct, VA-specific Rule of Two at issue in this case. *See infra* p.17.

The preferences in the Small Business Act for using small business suppliers are discretionary. *E.g.*, 15 U.S.C. § 637(a) (contracting officer "authorized in his discretion" to set aside contracts under § 8(a) program); *id.* § 657a(b) (contracts "may be awarded" to small businesses in historically underutilized business zones).

Consistent with this discretionary language, the FAR expressly provides that the small business set-asides in part 19 do not apply to FSS orders. 48 C.F.R. § 8.404(a) (part 19 "do[es] not apply" to FSS orders); *id.* § 8.405-5 ("the preference programs of part 19 are not mandatory" for FSS orders).

B. Amendments To The Small Business Act For Service-Disabled Veterans

In 1999, after finding that "[t]he United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," Congress enacted the Veterans Entrepreneurship and Small Business Development Act. Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234. The 1999 law amended the Small Business Act to require that the President and each agency set annual goals for contracting with service-disabled veteran-owned small businesses—akin to the annual goal-setting already required for small businesses. *Id.* § 502, 133 Stat. at 247 (amending 15 U.S.C. § 644(g)). The government-wide goal must be not less than 3%. 15 U.S.C. § 644(g)(1)(A)(ii).

The purpose of the 1999 law was to spur contracting officers to take a greater interest in awarding contracts to veterans who "sacrificed their health and limbs for our nation." S. Rep. No. 106-136, at 2 (1999); *see* H.R. Rep. No. 106-206, at 14 (1999) (intended to "raise the awareness of federal procurement officials"). By all accounts, that approach failed. Federal agencies, including the VA, fell so far short of the 3% goal—itself just the bare minimum—that the Administrator of the Office of Federal Procurement Policy described the relevant statistics as "disturbing" and "unacceptable."

The State of Veterans' Employment: Hearing before the H. Comm. on Veterans' Affairs, 108th Cong. 22 (2003) (statement of Angela Styles). A VA Deputy Secretary acknowledged that, even having tripled its performance from the year before, the agency was "at 6/10 of 1 percent" in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003 [et al.]: Hearing before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. 9 (2003) (statement of Leo Mackay, Jr.).

Congress responded to these failures with the Veterans Benefits Act of 2003, which amended the Small Business Act to create an explicit government-wide contracting preference in favor of service-disabled veterans. Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662. The 2003 Act permits contracting officers to set aside certain smaller contracts for a small business owned by a service-disabled veteran. 15 U.S.C. § 657f(a) ("sole source" awards). A contracting officer also "*may* award contracts on the basis of competition restricted to" service-disabled veteran-owned small businesses when at least two such businesses will submit offers and "the award can be made at a fair-market price." *Id.* § 657f(b) (emphasis added). These set-asides are expressly discretionary.

C. The 2006 Veterans Act

1. The combination of annual goals and discretionary tools proved unsatisfactory. By 2006, the House Committee on Veterans' Affairs—which had initiated both the 1999 and 2003 amendments to the Small Business Act—"remain[ed] frustrated with respect to the efforts of the majority of federal agencies" and with the apparent "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006). Ra-

ther than amend the Small Business Act yet again, the Committee set out to enact a contracting program specifically tailored to the VA, in recognition of its unique obligation to the nation's veterans. The result was the 2006 Veterans Act. Pub. L. No. 109-461, §§ 502-503, 120 Stat. at 3431-3436 (codified as amended at 38 U.S.C. §§ 8127-8128).

The purpose of the 2006 Veterans Act was for the VA "to set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." H.R. Rep. No. 109-592, at 16; *see H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 29 (2005) ("*2005 Hearing*") (statement of Chairman Boozman) ("It is hard for us to get the other agencies to fall in line if we can't have [the VA] as [a] great model to say, hey, you can do this without the world falling apart.").

Subsection (a) of § 8127 begins by requiring that the VA set annual goals for contracting with veteran-owned and service-disabled veteran-owned small businesses. The goal for service-disabled veteran-owned small businesses must equal or exceed the government-wide goal established by the President under the Small Business Act. 38 U.S.C. § 8127(a)(3).

Congress then made a critical choice in the subsections that followed. Rather than combine those goals with purely discretionary tools—the approach that had failed in the 2003 Act—Congress enacted a VA-specific "Rule of Two" provision stating that VA contracting officers "shall" restrict competition to veteran-owned small businesses:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added).

The statute contemplates only two exceptions ("[e]xcept as provided in subsections (b) and (c)"), both of which are even more favorable to veteran-owned small businesses than the Rule of Two provision that would otherwise apply. Under § 8127(b), a contracting officer "*may* use procedures other than competitive procedures" to award contracts to veteran-owned small businesses below a threshold amount. 38 U.S.C. § 8127(b) (emphasis added); *see* 41 U.S.C. § 134 (threshold of $100,000). Under § 8127(c), a contracting officer "*may* award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is above $100,000, but not greater than $5 million; the contracting officer determines the business is a responsible source; and the award can be made at "a fair and reasonable price." 38 U.S.C. § 8127(c) (emphasis added). These exceptions to the Rule of Two in § 8127(d) are discretionary; if the statutory criteria are met, a VA contracting officer "may,"

but need not, use these non-competitive set-asides. If the officer does not, the Rule of Two still applies.[1]

The set-aside procedures dovetail with other provisions of the Act indicating that Congress intended that veteran-owned and service-disabled veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15. The Act requires the VA to maintain a database of eligible businesses and establishes elaborate certification procedures for inclusion in the database, including penalties for misrepresentation. 38 U.S.C. § 8127(e)-(g).[2] This ensures that VA contracting officers have a ready source of information on eligible suppliers when applying the Rule of Two, and the VA's regulations state that "[w]hen conducting market research, VA contracting teams shall use the ... database." 48 C.F.R. § 810.001. The Act also includes a provision requiring the Secretary to "give priority to a small business con-

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[1] The VA criticized a draft version of these provisions for using "may" and "shall" in a way the agency deemed "inconsistent," and the agency requested that all three subsections be modified to use "may." H.R. Rep. 109-592, at 35 (statement of Gordon H. Mansfield, Deputy Sec'y, VA). Congress retained "shall" in § 8127(d) despite this request.

[2] The certification process was strengthened twice after 2006. *See* Veterans Benefits Act of 2010, Pub. L. No. 111-275, § 104(b)(1), 124 Stat. 2864, 2867; Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 706, 126 Stat. 1165, 1206. Congress also added § 8127(j) to require that agents contracting on the VA's behalf agree "to the maximum extent feasible" to comply with the Act. Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189. That amendment was prompted by perceived efforts by the VA to evade the 2006 Veterans Act by delegating purchasing authority to agents. H.R. Rep. No. 110-785, at 4-5 (2008).

cern owned and controlled by veterans" when choosing suppliers, even if the Secretary is permitted by "any other provision of law" to use a different contracting preference. 38 U.S.C. § 8128(a).

2. The VA adopted regulations to implement the Act in 2009. *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,632-64,633 (Dec. 8, 2009) (codified at 48 C.F.R. subpt. 819.70). These regulations repeat and confirm the mandatory language of the statute, starting with the set-aside for service-disabled veteran-owned small businesses:

> Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that [the Rule of Two will be satisfied].

48 C.F.R. § 819.7005(a) (emphasis added).

The VA's regulations do *not* limit this mandate based on the prefatory clause in § 8127(d) or the goal-setting provisions in § 8127(a). Instead, the three exceptions in the regulation mirror the exceptions in the statute. One permits a contracting officer to use non-competitive procedures for certain small contracts. 48 C.F.R. § 813.106. The other two recognize that a VA contracting officer "*may* award" contracts on a sole-source basis, as contemplated by § 8127(c). *Id.* § 819.7007(a) (emphasis added) (service-disabled veteran-owned small businesses); *id.* § 819.7008(a) (veteran-owned small businesses). The regulations emphasize that use of the sole-source procedures authorized by § 8127(c) is discretionary, not mandatory: "The contracting officer's determination whether to make a sole source award is a business decision wholly within the

discretion of the contracting officer." *Id.* §§ 819.7007(b), 819.7008(b). There is no analogous provision purporting to make the Rule of Two in § 8127(d) discretionary.

D. *Aldevra* Bid Protests

Notwithstanding the mandatory language of the statute and regulations, the VA continued to place orders from FSS contracts after the passage of the 2006 Veterans Act without first considering whether to conduct a set-aside for veteran-owned small business under the Rule of Two. That practice triggered a slew of bid protests by veteran-owned small businesses.

A bid protest is a written objection by an interested party to a solicitation or other request by an agency for the procurement of property or services. 48 C.F.R. § 33.101. By filing a bid protest, a government contractor challenges a federal agency's violation of procurement statutes or regulations that prejudice the contractor's ability to compete for a specific contract. Bid protests may be filed with the agency conducting the procurement, *id.* § 33.103; the Government Accountability Office ("GAO"), *id.* § 33.104; or the Court of Federal Claims, *id.* § 33.105.

The first bid protest over the VA's continued use of the FSS was filed at the GAO in 2011. *Matter of Aldevra*, 2011 WL 4826148, at *1 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"). The VA conceded that the Rule of Two was satisfied for at least one of the disputed procurements—that is, that two or more veteran-owned small businesses could provide the goods at fair and reasonable prices. *Id.* The VA contended, however, that it was not required to conduct the Rule of Two analysis mandated by § 8127(d) because FSS acquisitions are exempted by regulation from certain other

government-wide small business set-asides implemented in FAR part 19. *Id.* at *3; *see supra* pp.9-10.

The GAO rejected the VA's position, observing that both the 2006 Veterans Act and the VA's own implementing regulations "unequivocal[ly]" require the VA to restrict competition to veteran-owned small businesses when the Rule of Two is satisfied. *Aldevra I*, 2011 WL 4826148, at *2. As to the regulations cited by the VA, the GAO explained that the FAR specifically exempts FSS procurements only from the small business set-aside requirements of part 19, such as the government-wide, explicitly discretionary service-disabled veteran-owned small business set-aside authorized by the 2003 law. *Id.* at *3 (discussing 48 C.F.R. § 8.404(a)). By its own terms, that regulatory exemption "has no application to the [2006 Veterans Act]," which is a separate statutory scheme and which is not implemented in FAR part 19. *Id.* at *4.

The GAO confirmed its view in a second bid protest brought by Aldevra in 2012. *Matter of Aldevra*, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"). In that protest, for the first time in "numerous" protests on the same issue, the VA offered a new argument to support its FSS procurements—namely, that because § 8127(d) contains the prefatory clause "for purposes of meeting the goals under subsection (a)," the statute requires use of the Rule of Two only when the VA decides, in its discretion, that a particular procurement should be used to further its annual contracting goals. *Id.* at *3. The GAO also rejected that argument, explaining that the prefatory clause merely "explains the purpose for the mandate" but "does not create an exception to the mandate." *Id.* at *4.

The VA declined to follow the GAO's decision in both of the *Aldevra* bid protests, and in nearly twenty other bid protests on the same issue. GAO Report to Congress, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012); *see* CAJA67 (VA's 2011 announcement refusing to follow *Aldevra I*). Although the GAO's resolution of a protest is not binding on a federal agency, 31 U.S.C. § 3554(b), "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare," *CMS Contract Mgmt. Servs.* v. *Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014), *petition for cert. filed*, No. 14-781 (U.S. Jan. 5, 2015). There have been "fewer than five" such refusals "in the last decade." *Follow-up on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process: Hearing before the Subcomm. on Oversight & Investigations & Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 112th Cong. 32 (2011) (statement of Ralph White, Head of GAO Bid Protest Unit). Courts likewise respect the GAO's "'long experience and special expertise'" in resolving such disputes. *CMS*, 745 F.3d at 1384; *see Centech Group, Inc.* v. *United States*, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009) (GAO recommendations "instructive in the area of bid protests").

The standoff between the VA and GAO ended in December 2012. The GAO announced that it stood by its interpretation of the 2006 Veterans Act but would no longer hear bid protests on the issue in view of the inability of bid protestors "to obtain meaningful relief" from the VA's unlawful procurements. *Matter of Kingdomware Techs.—Reconsideration*, 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012).

E. Prior Proceedings

1. Kingdomware is a small business that develops and manages web, software, and database applications for both the public and private sectors. CAJA112. It is owned by Timothy Barton, a veteran who served in the U.S. Army during Operation Desert Storm and sustained a service-related injury that rendered him permanently disabled. The VA has certified Kingdomware as a service-disabled veteran-owned small business. CAJA5 n.1, 351.

Kingdomware filed multiple bid protests at the GAO over the VA's failure to apply the Rule of Two before using the FSS for procurements. CAJA116-118. One of Kingdomware's protests concerned a February 2012 procurement for emergency notification services for a group of VA hospitals and clinics, which the VA awarded to an FSS vendor without attempting to determine whether two or more veteran-owned small businesses could provide the services at fair and reasonable prices that offer best value to the United States. CAJA170-171. The GAO sustained Kingdomware's bid protests. *Matter of Kingdomware Techs.*, 2012 WL 1942256, at *2 (Comp. Gen. May 30, 2012). However, as with the *Aldevra* decisions, the VA refused to follow the GAO's recommendation. CAJA172.

2. Kingdomware then brought this action in the Court of Federal Claims for declaratory and injunctive relief from the VA's refusal to apply § 8127(d)'s Rule of Two before ordering from FSS suppliers. CAJA119-123; *see* 28 U.S.C. § 1491(b)(1) & note (Court of Federal Claims' exclusive jurisdiction over such suits). The VA acknowledged that its contracting officer made no effort to comply with the Rule of Two for the procurement at issue. CAJA171.

The Court of Federal Claims nevertheless granted summary judgment to the VA.[3] Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court first found the statute to be ambiguous—based in part on its view that the prefatory clause in § 8127(d) ("for purposes of meeting the goals") and the statute's overall "goal-setting nature" "cloud[ed] the clarity" of the otherwise clear "shall award" language. App. 62a-63a. The court then deferred to the VA's interpretation of the Act as not applying to FSS orders. App. 66a-71a.

3. A divided panel of the Federal Circuit affirmed on different grounds. Unlike the Court of Federal Claims, the panel majority "perceive[d] no ambiguity in § 8127." App. 15a. In its view, the statute "links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." App. 20a. To put those provisions in what the majority described as "harmonious context" (*id.*), the majority held that "the Secretary 'shall' use Rule of Two procedures" when the VA wishes to use a procurement to meet its annual goals but "may elect to use the FSS at other times so long as the goals are met" (App. 15a). The majority asserted that a contrary reading would render the statutory requirement that the Secretary set goals "superfluous" because the number of contracts awarded to veteran-owned small businesses would be determined not by the goals but rather by "the success or failure of the Rule of Two in the marketplace." App. 20a.

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[3] At the parties' request, the Claims Court also entered judgment on two other claims brought by Kingdomware raising the same legal question as to other procurements. CAJA372.

The majority also relied on extra-record statistics about VA contract awards to veteran-owned and service-disabled veteran-owned small businesses in recent years. The VA submitted those statistics after oral argument based on a request made during argument. The majority accepted and relied on these untested numbers to conclude that the VA had met the annual goals it was required to set for itself. App. 9a. Under that circumstance, the majority saw "no reason to compel" use of the Rule of Two. App. 21a.[4]

Judge Reyna dissented. In his view, the mandatory force of the statutory language "could not be clearer" (App. 23a), and the majority's construction "guts the Rule of Two imperative" of any force (App. 22a). As to the majority's reliance on the phrase "for purposes of meeting the goals," Judge Reyna explained that "'a prefatory clause does not limit or expand the scope of the operative clause.'" App. 26a; *see* App. 22a ("In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpreta-

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[4] In fact, the statistics are inaccurate. An audit by the VA's inspector general concluded that the agency had overstated its awards to veteran-owned and service-disabled veteran-owned small businesses in fiscal year 2010—the only year studied—by at least $500 million and possibly more, attributable largely to awarding and counting contracts to ineligible businesses. VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011). The same audit estimated that the VA's actual awards to eligible veteran-owned and service-disabled veteran-owned small businesses in 2010 were "anywhere from 3 to 17 percent" *lower* than reported. *Id.* Accounting for these inaccuracies, the VA may have awarded as few as 6% of its contracts to veteran-owned small businesses in 2010—far short of its reported 23% and its goal of 12%. *Id.* at 32 tbl. 5 (upper limit of error).

tion of the statute regardless of our policy views."). He further explained that the majority's interpretation is undermined by the VA's own regulations, which repeat the mandatory statutory language ("shall award") and *omit* the prefatory clause ("for purposes of"). App. 27a-29a (citing 48 C.F.R. §§ 819.7005-819.7006).[5]

Finally, Judge Reyna addressed the majority's reliance on the goal-setting provisions of subsection (a) In his view, the majority "overlook[ed] that participation goals are aspirations, not destinations," and thus may be exceeded without becoming superfluous. App. 30a. He also faulted the majority for "a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals." App. 31a. The goals are set by the Secretary, but the Rule of Two analysis "is undertaken by the contracting officer on a contract-by-contract basis." *Id.* "Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data [on whether the agency is meeting its goals] in making contracting decisions[.]" App. 27a. There is thus no practical way "contracting officers can determine that these goals have been 'met' before the end of the fiscal year." App. 32a. Judge Reyna concluded that, far from rendering subsections (a) and (d) harmonious, the majority's decision "deprives the Rule of Two mandate of its force and

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[5] The preamble accompanying the final publication of these regulations asserts that they "do[] not apply to FSS ... orders." 74 Fed. Reg. at 64,624. The VA asked the courts below to defer to that interpretation. U.S. C.A. Br. 30. The majority did not, although the Claims Court did in part. Judge Reyna noted in his dissent that "statements made in a preamble ... cannot override the unambiguous language of the regulations themselves." App. 28a; *see infra* p.31 & n.8 (explaining that the preamble does not support the agency's current litigating position).

effect," "impedes congressional objectives," and "renders § 8127(d) inoperative and unnecessary." *Id.*

The court of appeals denied Kingdomware's petition for rehearing en banc on September 10, 2014. App. 73a-74a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION DISREGARDS THE PLAIN LANGUAGE OF § 8127(d) AND DRAINS IT OF THE MANDATORY FORCE CONGRESS INTENDED

A. The Decision Contravenes This Court's Teaching That "Shall" Is Mandatory

The Federal Circuit failed to give effect to the plain language of § 8127(d). The statute does not say that contracting officers may elect to use the Rule of Two when they determine, at their discretion, that doing so would be helpful for meeting the Secretary's annual goals. Rather, "[t]he plain language of the 2006 Veterans Act unambiguously requires VA contracting officers to conduct a Rule of Two analysis in every acquisition and does not exempt [FSS orders] from this imperative." App. 22a (Reyna, J., dissenting).

The decision below thus contravenes a basic precept of this Court's precedent: "'The word 'shall' is ordinarily the 'language of command.'" *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947)). By contrast, Congress uses "may" in a statute to confer "some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). As the House drafting manual in effect in 2006 stated, "[f]or granting a right, privilege, or power, use 'may' .... For directing that action be taken, use 'shall[.]'" *House Legislative Counsel's Manual on Drafting Style* 61-62 (1995).

To be sure, "[t]his common-sense principle of statutory construction is by no means invariable," and context may sometimes require reading "shall" as discretionary in exceptional circumstances. *Rodgers*, 461 U.S. at 706; *see Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432 n.9 (1995). But a court has no warrant to "tak[e] such a liberty" with the statutory text when the two words ("shall" and "may") are used "in special contradistinction" to each other in the same law. *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895). In that case, the conclusion that "shall" creates a "discretionless obligation[]" is unavoidable. *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).

Section 8127 uses "shall" and "may" in precisely that contrasting way. Subsection (d) uses "shall" to indicate that application of the Rule of Two is mandatory in all cases, "[e]xcept as provided in subsections (b) and (c)." Those two subsections, by contrast, use "may" to indicate that they *permit*, but do not require, contracting officers to use set-aside authorities other than the Rule of Two in some circumstances.

The panel majority acknowledged the contrasting language in the three set-aside provisions and described the Rule of Two as a "mandate" and as "the required procedure." App. 20a. But its holding collapsed any distinction between the "mandate" in subsection (d) and the discretionary tools in subsections (b) and (c). In the majority's view, to meet the goals set each year, "the Secretary 'shall' use Rule of Two procedures, 'may' use the subsection (b) and (c) contract tools, and may elect to use the FSS at other times so long as the goals are met." App. 15a. That reading robs the distinction between "shall" and "may" of any force. If Congress had meant that a contracting officer "shall" use the Rule of Two unless he or she "elect[s]" not to, it would

have used the term "may" in each subsection—as the VA requested during the legislative process. *See supra* p.14 n.1. It did not, and reading the law as though it did is indefensible.

The inference that Congress used "shall" in deliberate contrast to "may" is further strengthened by considering the predecessors to the 2006 Veterans Act. *See Rodgers*, 461 U.S. at 707 (drawing similar comparison). The Veterans Benefits Act of 2003 created a government-wide Rule of Two set-aside for service-disabled veteran-owned small businesses that was expressly discretionary: A "contracting officer *may award* contracts" to service-disabled veteran-owned small businesses using the Rule of Two. 15 U.S.C. § 657f(b) (emphasis added); *see supra* pp.10-11. Dissatisfaction with that approach led in part to the 2006 Veterans Act, which eschewed the earlier measure's discretionary "may" for the mandatory "shall" while limiting that imperative to the VA. Absent this Court's review, the decision below will nullify Congress's decision to substitute "shall" for "may" when enacting a VA-specific Rule of Two.

B. The Decision Wrongly Transforms Congress's Prefatory Language Into A Loophole

The Federal Circuit sought to avoid the plain meaning of "shall award" by emphasizing that the Rule of Two is to be used "for purposes of meeting the goals" set by the Secretary under § 8127(a). But the majority's reasoning violates the axiom that prefatory clauses do not constrain or enlarge operative clauses, incorrectly assumes that the Rule of Two would render the Secretary's goal setting superfluous, and inserts unnecessary confusion and uncertainty into an otherwise clear statutory requirement.

First, a time-worn principle of statutory interpretation instructs that "a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); *see also, e.g.*, *id.* at 643 n.7 (Stevens, J., dissenting); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Association of Am. R.Rs.* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *NWF* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241-242 (2d Cir. 1965); 2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014).[6] Prefatory language may be used to *resolve* ambiguities in the operative language, *e.g.*, *Heller*, 554 U.S. at 577-578, but it may not be used to "*create* doubt or uncertainty," 2A Singer & Singer § 47:4 (emphasis added). Here, the panel majority manifestly did not consult the prefatory clause ("for purposes of") to resolve ambiguity in the operative language ("shall award"). Instead, it rejected Kingdomware's unambiguous "plain meaning interpretation" in order to imbue the prefatory clause with a limiting force Congress never intended. App. 20a. This violates the rule that "operative provisions should be given effect as operative provisions, and prologues as prologues." *Heller*, 554 U.S. at 578 n.3.[7]

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[6] The principle often arises with respect to statutory preambles but applies to statements of purpose regardless of location. *See, e.g.*, *Heller*, 554 U.S. at 577-578 (applying rule to prefatory clause of Second Amendment); Scalia & Garner, *Reading Law* 220 (2012) (limitation on the use of expressions of purpose in a statute applies whether language appears in the preamble or "in an adverbial phrase modifying the operative language").

[7] The panel majority's flawed interpretation does not even resolve the problem that purportedly motivated it—avoiding superfluous statutory language. App. 20a. The same prefatory clause

Second, the Federal Circuit's belief that a mandatory Rule of Two analysis would make the goal-setting provision "superfluous" (App. 20a) is clearly incorrect. There is no inconsistency between setting goals and requiring VA contracting officers to use a particular procedure to meet, if not exceed, those goals. The majority's contrary view improperly treats the goals as a ceiling rather than a floor.

Moreover, the Rule of Two does not guarantee that any particular contract or any particular percentage of contracts will actually be awarded to veteran-owned small businesses. In fact, it applies only when it is expected that "two or more small business concerns owned and controlled by veterans will submit offers" and "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Thus, even under a mandatory Rule of Two, the goals provide an important backstop if the Rule of Two falls short.

For example, the goals may help determine whether the VA uses the non-competitive procedures in § 8127(b) and (c), which are even more favorable to veteran-owned small businesses than the Rule of Two but, unlike that rule, are expressly discretionary. The goals may also inform how the VA trains and supervises contracting officers and the priorities the VA leadership communicates, both of which can shape the way the Rule of Two is implemented. The goals also promote transparency, oversight, and accountability for the VA

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appears in subsections (b) and (c), which are *already* discretionary by their terms. If the prefatory clause were meant to limit the force of the mandatory language in subsection (d), it would be entirely superfluous to include the same clause in subsections (b) and (c).

leadership if the agency falls short of its aspirations. Congress thus sensibly concluded that it was necessary to mandate both that the Secretary "shall" set goals and that, unless the non-competitive procedures of § 8127(b) and (c) are applied, VA contracting officers "shall" apply the Rule of Two.

Third, the court of appeals' reliance on the prefatory clause has created unnecessary confusion about how the Act operates in practice. The majority held that the Rule of Two is not mandatory "as long as the goals set under subsection (a) are met." App. 20a. It offered no guidance as to whether or when the Rule of Two might become mandatory if the VA falls short of its goals. Judge Reyna noted that there is no evidence in the record to suggest that VA contracting officers even have a mechanism to know whether the agency is meeting its goals when conducting a particular procurement. App. 32a. Indeed, the statistics on which the majority relied to show that the VA is meeting its goals are flawed. *Supra* p.21 n.4. These practical and procedural problems contrast starkly with the simplicity of Congress's straightforward command that VA contracting officers "shall" use the Rule of Two.

C. The Decision Misreads The Context And Legislative History Of The 2006 Veterans Act, Which Confirm That Congress Mandated Use Of The Rule Of Two

The context and legislative history of the 2006 Veterans Act confirm that VA contracting officers are required to use the Rule of Two. The Federal Circuit's misreading of that history further supports review by this Court.

Congress enacted the 2006 Veterans Act out of frustration with years of failure by federal agencies to

meet existing veteran-contracting goals. H.R. Rep. No. 109-592, at 15. At the time, all federal agencies—including the VA—*already* had discretionary set-aside authority to use the Rule of Two to restrict competition to service-disabled veteran-owned small businesses and were *already* required to set annual goals for awarding contracts to such businesses. *See supra* pp.10-11 (discussing 1999 and 2003 amendments to the Small Business Act).

Against that backdrop, Congress sought to create a special, VA-specific program that would cause the agency "to set the example among government agencies," H.R. Rep. No. 109-592, at 16, and that would ensure that veteran-owned and service-disabled veteran-owned small businesses are "*routinely* ... granted the *primary opportunity* to enter into VA procurement contracts," *id.* at 14-15 (emphases added). Furthermore, while Congress was crafting the relevant language, the VA requested that each set-aside subsection use the word "may," but Congress retained "shall" in subsection (d). *See id.* at 35 (statement of Gordon H. Mansfield, Deputy Sec'y, VA).

The Federal Circuit disregarded the natural inference that Congress did not intend to create simply another discretionary tool. The majority instead cherry-picked portions of the legislative history that appear to blame the VA's previous failures to meet its goals on "'the discretionary, not mandatory, nature of the goals.'" App. 20a (quoting H.R. Rep. No. 109-592, at 15). Those statements do not support the panel majority's strained reading of the statute; they show, at most, that legislators were frustrated that the VA had failed to achieve its goals when doing so was discretionary and that a new approach was necessary—hence the mandatory language of § 8127(d). *See, e.g., 2005 Hear-*

ing, 109th Cong. 2 (statement of Chairman Boozman) ("to date, virtually no Federal agency, including the VA" has met the annual contracting goals, the intent of the bill "is to rectify that as far as the VA is concerned," and the bill "will essentially change what has been a 'may' to a 'shall' in terms of goals").

D. The VA's Own Regulations Support The Mandatory Nature Of The Rule Of Two

Under *Chevron*, the first question a reviewing court confronts is whether, "applying the ordinary tools of statutory construction, ... 'the intent of Congress is clear'" from the statutory text. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843). If so, "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* Here, there is nothing ambiguous about Congress's command in § 8127(d) that VA contracting officers "shall award" contracts using the Rule of Two. The Court may therefore grant the petition and reverse the Federal Circuit's flawed interpretation of the statute without going beyond *Chevron* step one.

But even if there were some reason to go beyond this first step, applying the second step of the *Chevron* analysis merely confirms the error of the decision below and the need for this Court's review. The majority's strained effort to resolve the case in the VA's favor at the first step of *Chevron* is no accident. Had the majority found § 8127(d) ambiguous, it would have proceeded under the second step of *Chevron* to consider whether the agency had reasonably exercised its delegated authority to resolve the ambiguity. That second step is problematic for the majority's view because the VA's implementing regulations *omit* the very language

on which the panel majority relied—namely, the prefatory clause, "for purposes of meeting the goals"—and simply state that the VA "shall" apply the Rule of Two. 48 C.F.R. §§ 819.7005(a), 819.7006(a); *supra* pp.15-16.

Thus, even the VA did not argue that its regulations required the interpretation adopted by the majority. Instead, the VA argued for *Chevron* deference based on an interpretation of the 2006 Veterans Act given in a preamble to its final rulemaking, which stated that "this rule does not apply to FSS task or delivery orders." U.S. C.A. Br. 30 (citing 74 Fed. Reg. at 64,624).[8] The preamble, however, is not owed *Chevron* deference for multiple reasons. First, the preamble lacks the force of law, which is a necessary prerequisite to *Chevron* deference. *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013). Second, and relatedly, "language in the preamble of a regulation is not controlling over the language of the regulation itself." *Wyoming Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). Third, the preamble appeared for the first time in commentary on the final rule "without offering ... interested parties notice or opportunity for comment." *Wyeth* v. *Levine*, 555 U.S. 555, 577 (2009).

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[8] The preamble reasoned that the VA need not comply with the Rule of Two in § 8127(d) before placing an FSS order because FSS orders are governed by the FAR, which "states that [small business] set-asides do not apply to ... FSS acquisitions." 74 Fed. Reg. at 64,624. The GAO correctly perceived that these provisions of the FAR have no bearing on whether § 8127(d) itself requires the VA to apply the Rule of Two before proceeding to any other permissible procurement procedure. *Aldevra I*, 2011 WL 4826148, at *4. The set-asides discussed in the preamble (from which FSS orders are exempted) implement the earlier government-wide 2003 law, not the VA-specific 2006 Veterans Act. *Supra* p.17.

Even without these shortcomings, the preamble does not actually address the ambiguity the VA now perceives in § 8127(d). The preamble's discussion of the FSS makes no mention of subsection (a) or of the phrase "for purposes of meeting the goals under subsection (a)." It therefore provides no support for the Federal Circuit's decision.

E. Statistics Concerning The VA's Performance Do Not Excuse Its Failure To Comply With § 8127(d)

The panel majority's conclusion that "there is no reason to compel" the VA to use the Rule of Two rested in part on the majority's belief that the agency is already meeting the annual goals it sets for itself. App. 21a. That is not a proper reason to disregard § 8127(d)'s mandatory language. In any event, the panel majority's apparent belief that use of the Rule of Two was unnecessary as a policy matter was mistaken.

First, the VA's success in meeting its own goals is questionable. The VA's Inspector General has found—and reported to Congress—that the agency overstated the contracts it awarded to veteran-owned and service-disabled veteran-owned small businesses. *Supra* p.21 n.4. In at least some recent years, it may have failed to meet its goals.

Second, even if the VA had met its goals, they are merely goals. As Judge Reyna explained, "participation goals are aspirations, not destinations." App. 30a; *see also id.* (noting that contracting officers are required to use other small business set-asides, if applicable, even after annual goals are met). Meeting a goal the VA may adjust for itself is not a compelling reason to dispense with Congress's mandate to use the Rule of Two. In fact, in fiscal year 2013, the VA was not even

the leader among federal agencies in contracting with veteran-owned small businesses, in percentage terms. It was bested by, among others, the FCC, the federal judiciary, and USAID. GSA, *Small Business Goaling Report: Fiscal Year 2013*, at 1 (2014).

Third, even if the VA has met its goals to date, there is no guarantee that it will continue to do so. The long history of Congress's frustration with the agency before the 2006 Veterans Act suggests there is a significant likelihood the agency will fail to meet its goals at some point, if it has not already done so. In that event, the majority's results-driven approach leaves the operation of the statute entirely unclear. *Supra* p.28.

II. The Question Presented Is Important To The Nation's Veterans

A. The Federal Circuit's Flawed Interpretation Sets A National Rule

The Federal Circuit's flawed interpretation of the 2006 Veterans Act affects thousands of veterans across the nation and cannot be reconsidered, qualified, or countered by any Court save this one. This Court should grant review to restore the proper interpretation of the statute.

The only lower courts or agencies that could consider the question presented have done so. The Court of Federal Claims has exclusive jurisdiction to hear suits against the United States concerning "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C.

§ 1491(b)(1).[9] The Federal Circuit in turn has exclusive jurisdiction over appeals from the Court of Federal Claims. *Id.* § 1295(a)(3). Thus, even though the GAO rejected the VA's view, it has announced that it will no longer hear bid protests on the issue. *Supra* p.18.

The tools that Congress gave the Federal Circuit to maintain uniformity also amplify the court's errors and inconsistencies. Where, as here, the Federal Circuit deviates from sound practice and this Court's precedents, it is incumbent on this Court to intervene. That is particularly true on a question of statutory interpretation that affects numerous individuals and businesses.

This Court has repeatedly granted review to consider decisions of the Federal Circuit involving the interpretation of statutes in cases appealed exclusively to that court. *E.g.*, *Sebelius* v. *Cloer*, 133 S. Ct. 1886 (2013); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428 (2010); *United States* v. *Eurodif S.A.*, 555 U.S. 305 (2009). The need for review in this case is even more compelling.

B. The Decision Below Affects Billions Of Dollars In Contracting Opportunities For Veteran-Owned And Service-Disabled Veteran-Owned Small Businesses

If permitted to stand, the Federal Circuit's interpretation of the 2006 Veterans Act will result in substantially fewer opportunities for small businesses owned by veterans and service-disabled veterans than Congress intended. The VA procures approximately

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[9] The text of § 1491(b)(1) continues to refer to concurrent jurisdiction in the district courts, but that jurisdiction terminated in 2001. *See id.* § 1491 note (sunset provision).

$18 billion of goods and services annually, making it one of the single most important sources of government contracts. Nat'l Contract Mgmt. Ass'n, *2013 Annual Review of Government Contracting* 5 (2014). It has acknowledged that it "purchases approximately 60 percent of its goods and services through the FSS." 74 Fed. Reg. at 64,624. The VA is thus exempting more than $10 billion of procurements from the scope of the 2006 Veterans Act without any legal authority for this action. Nothing in the text or legislative history of the Act suggests that Congress contemplated such a loophole. Indeed, under the construction of the law adopted by the Federal Circuit, *not a single VA procurement* is necessarily subject to the Rule of Two.

The VA's invention of this loophole (and the Federal Circuit's blessing of it) cannot be defended as a measure to defend the public treasury. Taxpayers are automatically protected by the statute. Under the Rule of Two, competition is only restricted if there is a reasonable expectation that the award will be made "at a *fair and reasonable price* that offers *best value to the United States*." 38 U.S.C. § 8127(d) (emphases added). Nor will contracting officers be overburdened if required to consider the Rule of Two. The 2006 Veterans Act requires the VA to maintain a database of eligible veteran-owned and service-disabled veteran-owned small businesses. This database ensures that contracting officers already have at their fingertips a list identifying companies eligible for consideration under the Rule of Two. *Supra* p.14.

It can be difficult for any small business to get off the ground, particularly a small business owned by a service-disabled veteran or a veteran just reintegrating into civilian life. Inertia favors existing suppliers. Congress recognized that the VA has a unique duty to

shake off that inertia and to create opportunities for such businesses to establish themselves.

The Federal Circuit's decision threatens those opportunities and the ability of veteran-owned and service-disabled veteran-owned small businesses to obtain government contracts with other federal agencies. A central purpose of the 2006 Veterans Act was to transform the VA into a model agency to "set the example among government agencies for procurement with" veteran-owned and service-disabled veteran-owned small businesses. H.R. Rep. No. 109-592, at 16; *see supra* p.12. That purpose will be defeated if the VA is encouraged to do the bare minimum to meet its goals.

The loss to America's veterans from the Federal Circuit's decision will be significant. Veterans represent a unique cross-section of all Americans, and their military service poses a unique challenge for operating a small business. Recent veterans in particular struggle to rejoin the economy after their service ends. For example, the unemployment rate for veterans who have completed their military service since September 11, 2001, is nearly a quarter higher than for non-veterans. Hicks, *Youngest Veterans Struggle Most With Unemployment, Data Shows*, Wash. Post, Nov. 11, 2014. The VA's interpretation of the 2006 Veterans Act works at cross-purposes with its mission to serve veterans and to assist in reintegrating them into the economic fabric of the country.

America's veterans have made tremendous sacrifices for their country. This Court's review is urgently needed to ensure that the Federal Circuit's flawed statutory interpretation does not deprive them of important opportunities that Congress created to help veteran-owned small businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2013-5042

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

June 3, 2014

[754 F.3d 923]

* * *

Before PROST, *Chief Judge*,* CLEVENGER, and REYNA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CLEVENGER.

Dissenting opinion filed by *Circuit Judge* REYNA.

CLEVENGER, *Circuit Judge*.

This is an appeal from the final judgment of the United States Court of Federal Claims ("Court of Federal Claims") on a matter of statutory construction.

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* Sharon Prost assumed the position of Chief Judge on May 31, 2014.

The Court of Federal Claims ruled in favor of the United States, *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226 (Fed. Cl. 2012), and Kingdomware Technologies, Inc. ("Kingdomware") appeals. For the reasons set forth below, we affirm the final judgment of the Court of Federal Claims.

I

Kingdomware is owned and controlled by a service-disabled veteran. The Department of Veterans Affairs ("VA") certified Kingdomware as a service-disabled veteran-owned small business in September 2010 and recertified Kingdomware in September 2012.

It has long been the policy of the United States to promote small businesses, including small businesses owned and controlled by veterans. Congress has expressed this policy through the Small Business Act, 15 U.S.C. ch. 14A, and stated its expectation that small businesses generally will receive "a fair proportion of the total purchases and contracts for property and services for the Government ...." 15 U.S.C. § 644(a)(3). Veteran-Owned Small Businesses ("VOSBs") and Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs") are expressly recognized in the Small Business Act. *Id.* § 632(q).

The policy directive to promote small businesses lies within the statutes and regulations that guide Government contract formation. The general policies and procedures for Government contracting are contained in the Federal Acquisition Regulation ("FAR"), 48 C.F.R. ch. 1, which implements the Office of Federal Procurement Policy Act of 1974, 41 U.S.C. ch. 7. Certain agency-specific contract regulations are established agency by agency, and contract regulations spe-

cific to the VA are stated in the Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. ch. 8.

The overarching policy of the FAR generally demands that "[c]ontracting officers shall provide for full and open competition." 48 C.F.R. § 6.101(b). The Federal Supply Schedule ("FSS") exists as one of the tools for achievement of the overarching policy. The FSS was established by the General Services Administration ("GSA") to provide Government agencies with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying." *Id.* § 8.402(a). FSS contractors agree to provide goods and services on the FSS at stated prices for given periods of time, thus permitting agencies to buy supplies and services directly from the FSS, rather than using traditional full and open competition contract tools for such purposes. FSS contracts are deemed to satisfy the conditions of full and open competition. *Id.* § 8.404(a).

Unless otherwise specified by statute or regulation, an agency has wide discretion to decide the method of contracting to use, including the FSS. *Tyler Constr. Grp. v. United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009). The FAR specifies as a matter of contracting priority that an agency is encouraged to obtain goods and services from FSS contractors before purchasing from commercial sources, which include privately owned VOSBs and SDVOSBs. 48 C.F.R. § 8.004. The GSA considers its FSS program to be "the premier acquisition vehicle in government," accounting for 10% of overall procurement spending. *For Vendors—Getting on Schedule*, GENERAL SERVICES ADMINISTRATION (May 29, 2014), http://www.gsa.gov/portal/content/198473.

The FAR explicitly states that an agency placing an order against the FSS is exempt from requirements of the small business set-aside programs under FAR part 19. *See* 48 C.F.R. §§ 8.404(a), 8.405-5(a), 19.502-1(b). This exemption does not affect the VA's obligation under 48 C.F.R. § 19.502-1(a) otherwise to set aside contracts for competition among small businesses. "Although GSA awards most [FSS] contracts, it may authorize other agencies to award schedule contracts and publish schedules." *Id.* § 38.101(d). GSA has specifically delegated authority to the VA to procure medical goods and services under the VA Federal Supply Schedule Program. *Id.* § 38.000. For other goods and services, the VA uses the GSA FSS program. As a matter of policy, the VA encourages VOSBs and SDVOSBs to participate in the FSS program. Press Release, Dept. of Veterans Affairs, Statement on VA Veteran-Owned Small Business Contract (Oct. 28, 2011). Purchasing goods and services through the FSS is important to the VA and to VOSBs: in 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to VOSBs. Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Small Businesses*, WASH. POST, Nov. 14, 2011, at A20.

II

In 1999, Congress amended the Small Business Act to establish an aspirational Government-wide goal of awarding 3% of Government contracts to SDVOSBs. 15 U.S.C. § 644(g). History shows this 3% goal was not satisfied. For the 2001 fiscal year, SDVOSBs received but 0.24% of federal contract funds. *The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs*, 108th Cong. 92 (2003) (statement of Angela B. Styles, Adm'r Fed. Procurement). And the VA awarded only 0.1% of its contracts to SDVOSBs in 2000,

0.2% in 2001, and 0.6% in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003; H.R. 1712, The Veterans Federal Procurement Opportunity Act of 2003; and H.R. 1716, The Veterans Earn and Learn Act: Hearing Before the Subcomm. on Benefits of the H. Comm. on Veterans Affairs*, 108th Cong. 9 (2003) (statement of Leo Mackay, Deputy Sec'y of Veterans Affairs).

Congress again amended the Small Business Act in 2003 to focus on SDVOSBs. The 2003 Act grants discretionary authority ("a contracting officer may award") to contracting officers, Government-wide, to award sole-source contracts of restricted dollar amounts to SDVOSBs when the contracting officer estimates receipt of a fair and reasonable price, and otherwise to award contracts on the basis of competition restricted to SDVOSBs "if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f. The discretionary authority to award contracts beyond the limited dollar amount specified for sole-source contracts requires satisfaction of the Rule of Two, a procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses.

History again showed a failure to achieve the goal of the Small Business Act to award 3% of Government contacts to SDVOSBs: only 0.605% of Government contracts went to SDVOSBs in 2005. H.R. REP. NO. 109-592, at 16 (2006) ("H.R. REP."). Consequently, in 2006 Congress returned to the subject of preferences for businesses owned and controlled by veterans, enacting a statute specifically and only directed to the VA. While the Small Business Act and previous amend-

ments contained provisions relating only to SDVOSBs, the 2006 Veterans Act expanded the reach of the small business provisions to include both VOSBs and SDVOSBs.

In particular, Congress mandated that the Secretary of the VA "shall" establish a goal for each fiscal year for participation in VA contracts by VOSBs, and "shall" establish a goal for participation in VA contracts by SDVOSBs which "shall not be less" than the Government-wide goal set by the Small Business Act, which remained at 3%. 38 U.S.C. § 8127(a).

The Veterans Act of 2006, codified at 38 U.S.C. § 8127, gives contracting officers in the VA certain specific tools in subsections (b), (c), and (d) for achieving the goals to be set by the Secretary. As the House Report accompanying the statute explained: "[g]iven this new set of acquisition tools, there should be no reason for VA not to meet the veteran and service-disabled veteran small business contracting goals." H.R. REP., at 16.

For VA acquisitions for amounts less than what is called the simplified acquisition threshold (currently $150,000), § 8127(b) states that "a contracting officer [of the VA] may use procedures other than competitive procedures." Contracts under $150,000 can thus be sole-sourced to VOSBs and SDVOSBs without regard to the marketplace competitiveness of the price. Second, for contracts worth $150,000 up to $5,000,000, VA contracting officers "may" use procedures other than competitive procedures to grant sole-source contracts to VOSBs and SDVOSBs if the particular business concern (1) "is determined to be a responsible source with respect to performance of such contract opportunity"; and (2) "in the estimation of the contracting officer, the

contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(c). The authority given to VA contracting officers in subsections (b) and (c) of § 8127 is expressly "for purposes of meeting the goals under subsection (a)." Third, Congress also authorized use of restricted competition procedures by VA contracting officers. Thus, in addition to the noncompetitive methods authorized in subsections (b) and (c), Congress specified as follows in subsection (d):

> (d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(d) (reciting the Rule of Two within the "if" clause).

As an assist for achieving the goals under subsection (a), Congress ordered the VA in subsection (i) to give contracting priority to SDVOSBs and VOSBs over other small business entities. *Id.* § 8127(i). Thus, SDVOSBs and VOSBs enjoy primary opportunities over other small businesses.

The VA promulgated regulations for § 8127(d). Unlike that subsection, which does not distinguish be-

tween VOSBs and SDVOSBs, the VA provided a separate regulation for each group, repeating in each regulation the statutory language that the contracting officer shall award contracts according to the Rule of Two. 48 C.F.R. § 819.7005 (providing for SDVOSBs); § 819.7006 (providing for VOSBs). The regulations further specify that contracting officers must give preference to SDVOSBs over VOSBs, and if only one SDVOSB makes an offer at a fair and reasonable price, the contracting officer "should make" the award to that offeror (thus converting the Rule of Two to a Rule of One). *Id.* § 819.7005. If no acceptable offer is made by a SDVOSB, the contracting officer "shall" withdraw the SDVOSB set-aside and process the procurement as a VOSB set-aside. *Id.* If only one VOSB makes a fair and reasonable price offer, the contract officer "should make" the award to that offeror, and if no acceptable offer is made, the contracting officer "shall" process the procurement under other small business set-aside programs. *Id.* § 819.7006. In the preamble to the regulations, the VA expressed its view that 38 U.S.C. § 8127(d) "does not apply to FSS task or delivery orders" and that the VA would "continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). In practice, the VA has continuously and consistently interpreted § 8127(d) as not affecting its authority to place orders under the FSS, and as granting it the flexibility to achieve the subsection (a) goals by any of the three § 8127 methods.

History has proven true the prediction made in the legislative history of § 8127. The 2006 Act did not become effective until 180 days after its enactment on De-

cember 22, 2006, and as a result was not fully implemented until the 2008 fiscal year. For that year and thereafter, the Secretary set goals well beyond the previous 3% Government-wide goal for SDVOSBs, and achieved well beyond his stated goals, as shown below.

Year	VOSB Goal	VOSB Attainment	SDVOSB Goal	SDVOSB Attainment
2008	10%	14.89%	7%	11.78%
2009	10%	19.98%	7%	16.96%
2010	12%	23.08%	10%	20.05%
2011	12%	20.50%	10%	18.22%
2012	12%	21.77%	10%	19.24%

Memorandum from James B. Peake, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Facility Directors (Jan. 28, 2008); Memorandum from Eric K. Shinseki, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Directors (May 7, 2010); Memorandum from Eric K. Shinseki, Sec'y of Veterans Affairs, to Under Sec'ys, Assistant Sec'ys, Other Key Officials, Deputy Assistant Sec'ys, and Field Directors (Feb. 21, 2012); Summary of Veterans Affairs Veteran Owned Small Business Goals Achieved for FY 2006 through FY 2012 (Mar. 18, 2014).

III

This suit arises from the following undisputed facts. In early 2012, the VA decided to implement an Emergency Notification Service in several of its medical centers. The VA contracting officer chose to use the GSA

FSS to procure the needed services, and awarded the contract to a FSS vendor which was not a VOSB. On March 14, 2012, Kingdomware, a certified SDVOSB and qualified FSS contractor, filed a bid protest with the Government Accountability Office ("GAO"). Kingdomware challenged the contract award as illegal on the ground that § 8127(d) always bars the VA from using the FSS without first invoking the Rule of Two and if satisfied, awarding the contract pursuant to the Rule of Two. The VA argued that subsection (d)'s requirement to invoke this Rule of Two applies only when the VA determines that this is necessary to meet the established contracting goals. The GAO, relying on its opinion in a previous case, *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), rejected the VA's argument, and issued a recommendation decision that the VA cancel the contract award already made and resolicit the requirement as a SDVOSB set-aside, *Kingdomware*, B-406507, 2012 CPD ¶ 165 (Comp. Gen. May 30, 2012).

The VA soon after responded to the GAO and Kingdomware, announcing that it would not acquiesce in GAO's recommendation decision. The VA was on firm ground in refusing to accept the GAO decision. Although agencies often follow GAO recommendations in bid protest decisions "given the GAO's long experience and special expertise in such ... matters," *CMS Contract Mgmt. Servs. v. Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (internal citation omitted), these recommendations are not binding on an agency. *See Honeywell, Inc. v. United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989) (noting that the provisions of the Competition in Contracting Act "do not compel procuring agencies to obey the recommendation of the Comptroller General ...." (internal citation

omitted)). By enforcing its long-standing interpretation of § 8127(d), the VA set the stage for Kingdomware's retreat to the United States Court of Federal Claims.

IV

Kingdomware filed its complaint on March 15, 2012. The parties stipulated to the facts as presented here and cross-moved for summary judgment. Both parties claimed victory on the plain meaning of § 8127(d). Kingdomware argued that the word "shall" in the statute is an unambiguous imperative that the Secretary can never use the FSS where the Rule of Two may be satisfied. The VA responded that Kingdomware's view writes out of the statute its obligation to set the goals for VOSB contract awards because a mandatory set-aside requirement for all contracts would obviate the need for the Secretary to establish goals. The VA argued that all the words in § 8127 have to be accounted for, and that "for the purposes of meeting the goals under subsection (a)" language in subsection (d) gives clear meaning to the "shall" imperative to use the Rule of Two procedure: § 8127(d) properly understood only compels the VA to conduct a Rule of Two analysis when the Secretary determines that doing so is necessary to meet the goals set by him under subsection (a).

The Court of Federal Claims reasoned that Kingdomware's interpretation of § 8127(d) is not supported by the plain language of the statute because it does not account for the mandatory goal-setting requirements of the section and the command that the Rule of Two procedure be used "for purposes of meeting the goals." Without addressing the VA's plain meaning interpretation, the Court of Federal Claims ruled that "the goal-setting nature of the statute clouds the clarity plaintiff would attribute to the phrase 'shall award' in subsec-

tion (d) of the Act, and renders the Act ambiguous as to its application to other procurement vehicles, such as the FSS." *Kingdomware*, 107 Fed. Cl. at 241.

Having found ambiguity in subsection (d) under the first step of the analysis laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court of Federal Claims then assessed the reasonableness of the VA's consistent interpretation of the statute, which was first expressed in the preamble of the regulations promulgated for the 2006 Act after notice and comment rule-making, and since articulated in policy statements, *see, e.g.*, Press Release, Dept. of Veterans Affairs, Statement on VA Veteran-Owned Small Business Contract (Oct. 28, 2011), and in litigation. Because the regulations themselves do not expressly state that the subsection does not apply to the FSS, the court declined *Chevron* deference to the VA's interpretation. But since the regulations only recite statutory language verbatim, and that language was found ambiguous, and because the regulations are wholly silent as to what role the FSS might play in meeting the goals set by the Secretary, the court considered granting deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the clear statement of the VA's interpretation in the regulations' preamble.

The Court of Federal Claims concluded that the VA's interpretation has many of the blazemarks favoring deference under *Skidmore*. First, the VA's view that § 8127 does not apply to the FSS has been consistent over time, reflecting a uniform administrative and litigation stance by the VA. Second, the VA's view is not directly in conflict with the words of the statute or the regulations, both of which are silent on the role of the FSS in meeting the Secretary's goals. Also, the

legislative history of the statute expressed an intent that the VA retain the "option" to award contracts to SDVOSBs and VOSBs, and would "exercise reasonable judgment" in meeting the required set-aside goals alongside the VA's obligation to satisfy small business awards to other groups, such as women's owned businesses. 152 Cong. Rec. S11609-03, S11615, S11616 (Dec. 8, 2006). Third, the VA's interpretation as stated in the preamble of the regulations is crystal clear and was made in the context of notice and comment rulemaking. Finally, the court noted that the VA's interpretation is consistent with the Government-wide traditional relationship between set-asides for small businesses and the FSS as found in the FAR, namely that agencies are not required to implement small business set-aside programs before or while using the FSS. The Court of Federal Claims thus found the VA's interpretation sufficient to warrant deference. Accordingly, the VA's cross-motion for summary judgment was granted.

Kingdomware timely appealed to this court. We have jurisdiction over the appeal under 28 U.S.C. § 1295(a)(3).

V

We review the Court of Federal Claims' grant of summary judgment without deference. *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012). In reviewing an agency's action in a bid protest case, we generally apply the Administrative Procedure Act's "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of a procedure required by law" standard of review. 5 U.S.C. § 706(2)(A), (D); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001). Here, since there are no

factual or mixed factual and legal issues, and the only question is one of statutory construction, we apply the *Chevron* standard. *See Dominion*, 681 F.3d at 1317.

Chevron requires a reviewing court to determine by statutory construction, at the first step, "whether Congress has spoken to the precise question at issue." 467 U.S. at 842. If so, the "unambiguously expressed intent" of Congress prevails. *Id.* at 843. If, however, Congress has not spoken to the issue at hand, or has done so ambiguously, "the question for the court [at step two] is whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* If so, the agency's view of the law prevails. The interpretative exercise begins with the language of the statute, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977), and uses "traditional tools of statutory construction," including the "statute's text, structure, and legislative history, and ... the relevant canons of interpretation." *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

In the case before us, Congress did speak directly to the question of the Secretary's authority to use the Rule of Two "for purposes of meeting the goals under subsection (a)," stating that for such purposes the Secretary "shall" use the Rule of Two procedures. For the reasons explained below, we conclude that Kingdomware's interpretation of § 8127(d) does not account for, and undercuts, the Secretary's mandatory authority to set the goals for contracts to VOSBs, and therefore is not a reasonable interpretation. By directly tying the mandatory Rule of Two contracting procedure set forth

in subsection (d) to the achievement of the goals set pursuant to subsection (a), Congress's intent is clear. Congress intended the VA to meet the goals set by the Secretary. To meet the goals, the Secretary "shall" use Rule of Two procedures, "may" use the subsection (b) and (c) contract tools, and may elect to use the FSS at other times so long as the goals are met. We perceive no ambiguity in § 8127, which "is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

VI

Kingdomware argues that the mandatory language of § 8127(d)—"shall award"—requires the VA to conduct a Rule of Two analysis in all cases (other than those covered by subsections (b) and (c)), including those cases where the VA would prefer to order against the FSS. Kingdomware points out that Congress used language almost identical to that in § 8127 in the 2003 Veterans Act, but importantly, changed the permissive term "may" to the mandatory term "shall."[1] It invokes the canon of construction that a change in legislative language generally gives rise to a presumption that Congress intended to change the meaning of

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[1] The 2003 Veterans Act remains in effect and applies to all agencies. The 2006 Act, in contrast, applies only to the VA. The relevant provision of the 2003 Act states:

> In accordance with this section, a contracting officer *may award* contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the [Rule of Two is satisfied].

15 U.S.C. § 657f(b) (emphasis added).

the law. *See Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1428 (Fed. Cir. 1997).

According to Kingdomware, the legislative history of the 2006 Act also supports its interpretation of § 8127(d). Kingdomware cites legislative history suggesting that the 2006 Act was passed following frustration with agencies' failure to meet the permissive VOSB contracting goals of the 1999 and 2003 Acts, and that Congress, in passing the 2006 Act to apply solely to the VA, "expect[ed] [the] VA to set the example among government agencies" for contracting with VOSBs. H.R. REP., at 15-16.

Kingdomware also points to legislative history wherein the bill's sponsor, John Boozman, explicitly noted the change in language from "may" to "shall" in § 8127(d), stating that "[t]he bill will essentially change what has been a 'may' to a 'shall' in terms of goals ...." *H.R. 1773, the Native American Veteran Home Loan Act; H.R. 3082, the Veteran-Owned Small Business Promotion Act of 2005; and Four Draft Bills: Hearing Before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans Affairs*, 109th Cong. 2 (2005) (statement of Rep. John Boozman, Member, H. Comm. on Veterans Affairs).

Finally, Kingdomware notes that in the Report accompanying the legislation, the Committee on Veterans' Affairs stated that "small businesses owned and controlled by veterans and service-disabled veterans should *routinely* be granted the *primary opportunity* to enter into VA procurement contracts." H.R. REP., at 14-15 (emphases added). According to Kingdomware, this is evidence that Congress intended the VA to determine whether the Rule of Two was satisfied for every contract before it could look to the FSS.

Kingdomware assigns no substantive meaning to the phrase "for purposes of meeting the goals under subsection (a)," and instead contends that the words only state the objective for Rule of Two awards, i.e., to meet the Secretary's goals. Kingdomware is adamant that the "for purposes" words have no limiting effect. But Kingdomware does not explain why Congress intended "shall" to continue as an imperative after the Secretary's goals are achieved, or why Congress intended for the goals to be set not by the Secretary, but by whatever success VOSBs have under the Rule of Two in the marketplace.

Looking first to the text of the statute, the VA notes that the mandatory language of subsection (d)—"shall award"—is preceded by the phrase "for purposes of meeting the goals under subsection (a)." While Kingdomware maintains that this phrase is merely hortatory, the VA argues that it must be given effect, and that, read as a whole, the provision mandates a Rule of Two analysis only for those contracts the VA has decided are necessary "for purposes of meeting the goals under subsection (a)."

Under § 8127(a), the VA is required to set VOSB contracting goals with a mandatory statutory floor. The VA points out that it retains significant discretion under this subsection to set the numerical value of these goals. According to the VA, this discretion would be meaningless, and the goal-setting provision of § 8127(a) would be rendered superfluous, if it were required to apply the Rule of Two for every contract. Under Kingdomware's interpretation of § 8127, the goal would be whatever number the Rule of Two produces, regardless of the Secretary's preference.

Responding to Kingdomware's argument that "shall" in the 2006 statute is necessarily entirely imperative because "may" limited the Rule of Two in the 2003 statute, the VA explains that "shall" in subsection (d) exists to distinguish "may" with regard to the noncompetitive set-aside procedures of subsections (b) and (c). In support, the VA cites the legislative history of the 2006 Act which explains clearly that Congress preferred use by the Secretary of the Rule of Two over the permissive noncompetitive procedures. H.R. REP., at 16. The VA thus reads subsection (d) in context with subsections (b) and (c) to give meaning to "shall" that does not preclude use of the FSS.

The VA also asserts that Kingdomware's reading of "shall" conflicts with its multiple small business contracting responsibilities. According to the VA, if it were to follow subsection (d)'s Rule of Two in every instance, in addition to respecting the contracting priorities of subsection (i), it would be unable to meet other small business contracting goals specified by the Small Business Act. Moreover, the VA points out that under the Small Business Act, including the 2003 Veterans Act amendments, agencies have always retained the discretion to use the FSS in lieu of following the Rule of Two. *See* 48 C.F.R. §§ 8.404(a), 19.502-1(b). It argues that a single wording change—from "may" in the 2003 Veterans Act to "shall" in the 2006 Act—without further explicit guidance as to how the provisions of the 2006 Act interact with the FSS is insufficient evidence that Congress intended to disrupt the existing scheme here. According to the VA, Kingdomware's interpretation would lead to the untenable result wherein the VA is unable to use the FSS for even routine and minor purchases.

Despite its consistent practice of retaining the discretion to forego the Rule of Two when using the FSS, the VA notes that since the passage of the 2006 Act it has consistently set and exceeded ambitious VOSB contracting goals. This is evidence, in the VA's view, that its interpretation is consistent with the aims of Congress in passing the 2006 Act, as expressed in the legislative history.

VII

It is a bedrock principle of statutory interpretation that each word in a statute should be given effect. *See Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."); *see also Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1345 (Fed. Cir. 2010) (concluding that a party's proposed statutory interpretation "violat[ed] the rule of statutory construction that Congress does not use unnecessary words.").

Kingdomware's interpretation of subsection (d) assigns dispositive weight to the command term "shall," but ignores additional statutory language stating that this mandate is "for purposes of meeting the goals under subsection (a)." Under Kingdomware's interpretation, the statute's mandate requiring the VA to conduct a Rule of Two analysis would apply to every competitive contract contemplated by the VA without any regard for the VOSB contracting goals set under subsection (a), despite the provision's explicit reference to these goals. Indeed, Kingdomware conceded at oral argument that under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even *after* it has met the

goals set under § 8127(a). Oral Argument at 4:05-5:20. Further, as the VA points out, if § 8127(d) requires the agency to conduct a Rule of Two analysis for every contract irrespective of the goals set under subsection (a), this goal-setting provision is itself made superfluous. Because Kingdomware's plain meaning interpretation of § 8127(d) reads the words "for purposes of meeting the goals under subsection (a)" out of the statute and makes the mandatory goal-setting statutory provision unnecessary, it cannot stand.

The statutory scheme as a whole links the Rule of Two mandate (denoted by the word "shall") in subsection (d) to the goals set under subsection (a). The mandate is, therefore, the required procedure for meeting these goals. It is fully consistent with subsection (a), which requires the VA to set goals for contracting with VOSBs, but grants the VA considerable discretion to set the value of these goals. Accordingly, the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met. The correct reading of the statute according to its plain meaning puts the "shall" in subsection (d) in harmonious context with the discretionary "may" provisions of subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace.

Congress enacted § 8127 out of frustration with the failure of agencies Government-wide to achieve the aspirational goals of 3% for SDVOSBs. In hearings leading up to the 2006 Veterans Act, the prime reason for failure to achieve the Government-wide goals was "the discretionary, not mandatory, nature of the goals." H.R. REP., at 15. As Rep. Boozman observed, § 8127 changed what had been a "may" to a "shall" in terms of

goals. Congress chose the VA to set the example among Government agencies by imposing on it the obligation to meet the goals set by the Secretary for both categories of veteran-owned small businesses. *Id.* Indeed, Congress anticipated that with the contracting tools provided in § 8127, the VA would be able to "meet, if not exceed" its contracting goals, *id.*, while at the same time fulfilling the goals it has set for other small business entities. 152 Cong. Rec. S11609-03, S11616 ("The goals for veteran and service-disabled veteran owned businesses are not in any way intended to prevent attainment of other set-aside goals.").

As it stands, there is no reason to compel the Secretary to set aside any contract for a Rule of Two inquiry before using the FSS notwithstanding his goals, as Kingdomware requests. The VA has consistently met the mandatory goals for procurement from SDVOSBs and VOSBs in each year since the Veterans Act of 2006 went into force, and Kingdomware does not contend otherwise. The Secretary has complied with his statutory mandate to both set goals and meet them, and, accordingly, the VA contracting officer's decision not to set aside the contracts at issue was not arbitrary, capricious, or contrary to the law.

CONCLUSION

For the reasons provided above, we affirm the final decision of the Court of Federal Claims in favor of the VA.

AFFIRMED

COSTS

Each side shall bear its own costs.

REYNA, *Circuit Judge*, dissenting.

The majority holds that the 2006 Veterans Act does not require the Department of Veterans Affairs ("VA") to conduct a Rule of Two analysis in every procurement, as long as the VA satisfies its annual small business participation goals. I do not construe the 2006 Veterans Act as giving the VA discretion to decide whether to conduct a Rule of Two analysis. For this and other reasons set forth below, I respectfully *dissent*.

I.

The plain language of the 2006 Veterans Act unambiguously requires VA contracting officers to conduct a Rule of Two analysis in every acquisition and does not exempt task or delivery orders under the Federal Supply Schedule ("FSS") from this imperative. Despite the statute's clarity, the majority guts the Rule of Two imperative of its full force and effect by holding that a Rule of Two analysis is not required for every contract "as long as the goals set under subsection (a) are met." Maj. Op. at 19. Participatory goals, however, are aspirational, and an agency cannot refuse to set aside an acquisition solely because small businesses already receive a fair proportion of the agency's contracts.[1] In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpretation of the statute regardless of our policy views.[2]

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[1] 48 C.F.R. § ("FAR") 19.502-6(f); *see also LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002).

[2] *See Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring) (noting that it "'is not within our province to second-guess' the 'wisdom of Congress' action' by picking and choosing our preferred interpretation from among a range of potentially

The statutory provision at issue could not be clearer. It provides that contracting officers "*shall* award contracts" on the basis of restricted competition whenever the contracting officer has a reasonable expectation that the Rule of Two will be satisfied:

> (d) **Use of restricted competition.**—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall award contracts* on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added). This provision is part of a broader veteran-owned small business contracting program congressionally tailored to the VA, which requires the Secretary of the VA to increase small business contracting opportunities by establishing annual participation goals for veteran-owned small businesses ("VOSB") and service-disabled veteran-owned small businesses ("SDVOSB") in VA acquisitions. *Id.* § 8127(a)(1). This statutory program confirms the imperative character of subsection (d). Specifically, for contracts below the simplified acquisition threshold ($150,000), VA contracting officers "*may* use procedures other than competitive procedures" in awarding contracts to veteran-owned small businesses.

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plausible, but likely inaccurate, interpretations of a statute" (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003))).

Id. § 8127(b) (emphasis added). Similarly, for acquisitions valued above the simplified acquisition threshold but below $5 million, VA contracting officers "*may* award a contract" to a veteran-owned small business using noncompetitive procedures as long as certain requirements are met. *Id.* § 8127(c) (emphasis added).

In contrast, subsection (d) of the 2006 Veterans Act applies to all VA acquisitions and requires VA contracting officers to conduct a Rule of Two analysis in every acquisition, without limitation. Unlike subsections (b) and (c), which use discretionary language ("may use" and "may award"), subsection (d) uses mandatory language ("shall award"), and does not otherwise give discretion to VA contracting officers to decide whether to conduct a Rule of Two analysis. As the Supreme Court has noted, the word "shall" is ordinarily the language of command, and when the same statute uses both "may" and "shall," the normal inference is that each is used in its usual sense and that the former is permissive, the latter mandatory.[3]

Consistent with the 2006 Veterans Act's imperative, the Government Accountability Office ("GAO") has sustained more than seventeen protests in response to the VA's refusal to comply with § 8127(d).[4] As the GAO held, "The provisions of both the VA Act and the [VA Acquisition Regulation] are unequivocal; the VA 'shall' award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable ex-

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[3] *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see also Kentucky, Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222, 1227 (Fed. Cir. 2005).

[4] U.S. Gov't Accountability Office, B-158766, *GAO Report to Congress for Fiscal Year 2012* (Nov. 13, 2012).

pectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price." *Aldevra*, B-405271, 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011). The GAO further concluded that "the VA Act requires, without limitation, that the agency conduct its acquisitions using SDVOSB set asides where the necessary conditions are present." *Id.*

The majority summarily dismisses any reliance on the GAO's construction, noting that "the VA was on firm ground in refusing to accept the GAO decision." Maj. Op. at 10. Yet, we have long noted that GAO recommendations, although not binding, are nevertheless "instructive in the area of bid protests."[5] The Court of Federal Claims routinely "'give[s] due weight and deference' to GAO recommendations 'given the GAO's long experience and special expertise in such bid protest matters.'"[6] The majority ignores that GAO's experience and special expertise is such that "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare." *Id.* Indeed, we recently acknowledged that "from 1997-2012, the GAO issued 5,703 merit decisions and sustained 1099 protests; during that period, an agency disregarded the GAO's recommendation only ten times." *Id.* at 1384-85. Hence, although not binding precedent, the GAO "plays an important role in the resolution of contested procurement decisions," and its construction of the 2006 Veterans Act is consistent with § 8127(d)'s "unequivocal" imperative to conduct a Rule of Two anal-

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[5] *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 n4 (Fed. Cir. 2009) (citing *Planning Research Corp. v. United States*, 971 F.2d 736, 740 (Fed. Cir. 1992)).

[6] *CMS Contract Mgmt. Servs. v. United States*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (quoting *Baird Corp. v. United States*, 1 Cl. Ct. 662, 668 (1983)) (alteration in original).

ysis in every procurement. *Honeywell, Inc. v. United States*, 870 F.2d 644, 647-48 (Fed. Cir. 1989).

II.

To override the clear imperative of § 8127(d), the majority relies on the provision's prefatory language to reason that requiring a Rule of Two analysis in every VA procurement "makes the mandatory goal-setting statutory provision unnecessary." Maj. Op. at 19. Prefatory language is introductory in nature and does nothing more than explain the general purpose for the Rule of Two mandate. The Supreme Court has noted, albeit in the context of constitutional construction, that "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause" and that operative provisions should be given effect as operative provisions, and prologues as prologues. *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008). Here, the operative clause is that VA contracting officers must award contracts on the basis of restricted competition if they have a reasonable expectation that the Rule of Two will be satisfied, a mandate that cannot be limited by its prologue.

The majority takes an unusual step of collecting extrinsic evidence to show that "[t]he VA has consistently met the mandatory goals for procurement from SDVOSBs and VOSBs in each year since the Veterans Act of 2006 went into force[.]" Maj. Op. at 20. While the exact rationale for exploration outside the record is not clear, the majority apparently rests on these statistics to conclude that "there is no reason to compel the Secretary to set aside any contract for a Rule of Two inquiry" where the goals were met for the time period in question. *Id.* This is an improper construction of the statute, as it adds a limitation that does not exist in the

plain words of the statute. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004). Moreover, these statistics were not before the Court of Federal Claims or relied upon by either party, but were provided in response to a request during oral argument. As the appellant notes, the VA submission does not identify the source of the data and "appears to have been created specifically in response to the Court's request in this litigation." ECF#50, Appellant Letter to Court (Apr. 2, 2014). Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data in making contracting decisions, and the GAO has explicitly held that an agency's belief it has satisfied its small business goals does not affect its obligation to conduct a Rule of Two analysis.[7] In sum, the majority's use of this extrinsic evidence is post hoc rationalization constructed to shore-up an otherwise unsound construction of the statute.

III.

The majority's reliance on the phrase "for purposes of meeting the goals" is also belied by the VA's own regulations, which contain no such language. Specifically, in 2009, the VA issued regulations reiterating the imperative to conduct a Rule of Two analysis in every acquisition. *See* 48 C.F.R. §§ 819.7005, 817.7006. These regula-

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[7] *LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002); *see also* FAR 19.502-6(f) (noting that agencies cannot refuse to set aside an acquisition solely on the basis that "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services").

tions, which use the mandatory phrase "shall set-aside," do not contain the phrase "for purposes of meeting the goals" or any other mention of the goals.[8] The VA's regulations thus unequivocally require the VA to conduct a Rule of Two analysis in every procurement, which is consistent with the agency's authority to write regulations as broadly as it wishes, subject only to the limits of the statute. *Auer v. Robbins*, 519 U.S. 452, 463 (1997). The majority downplays the regulation's imperative by pointing to the preamble to the regulations. Maj. Op. at 8 (quoting 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009)). Again, statements made in a preamble as part of the notice-and-comment process cannot override the unambiguous language of the regulations themselves. That is, where the enacting or operative parts of a statute or regulation are unambiguous, the meaning of the statute or regulation cannot be controlled or limited by the language in the preamble.[9] Accordingly, the VA's refusal

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[8] The VA Acquisition Regulation provides:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall set-aside an acquisition* for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> 1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> 2) Award will be made at a fair and reasonable price.

48 C.F.R. § 819.7005 (emphasis added); *see also id.* § 819.7006 (applying same set-aside regulation to VOSBs). The exceptions mentioned at 48 C.F.R. §§ 813.106, 819.7007, and 819.7008 relate to sole-source awards and are thus not relevant to this appeal.

[9] *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (quoting *Assoc. of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

to conduct a Rule of Two analysis before proceeding to the FSS is at minimum a violation of its own regulations, if not also a violation of § 8127(d).

IV.

The majority does not address the practical implications of its decision in light of the VA's *existing* obligation under the Federal Acquisition Regulation ("FAR") to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000. FAR 19.502-2.[10] By holding that the 2006 Veterans Act's Rule of Two provision is discretionary, the majority effectively renders § 8127(d) superfluous and unnecessary in light of the FAR's existing Rule of Two requirement. Although the FAR exempts task or delivery orders awarded under FSS contracts from the general Rule of Two requirement, *see* FAR 19.502-1(b), the 2006 Veterans Act is devoid of any similar language that would allow the VA to proceed directly to the FSS without first conducting a Rule of Two analysis. Hence, the majority's holding reads this exemption into § 8127(d) and expands the VA's discretion to decide when to conduct a Rule of Two analysis, thereby undermining the statutory role of § 8127(d).

The majority, on the other hand, finds mischief in requiring contracting officers to continue conducting

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[10] The FAR contemplates two situations in which the contracting officer must conduct a Rule of Two analysis. For acquisitions exceeding $3,000 but less than $150,000, the contracting officer must award the contract on the basis of restricted competition unless he or she makes an affirmative finding that the Rule of Two is not reasonably expected to be satisfied. *Id.* § 19.502-2(a). For acquisitions exceeding $150,000, "[t]he contracting officer *shall set aside*" the acquisition for small businesses "when there is a reasonable expectation that" the Rule of Two will be met. *Id.* § 19.502-2(b) (emphasis added).

Rule of Two analyses after the agency's goals are met. The majority concludes that requiring a Rule of Two analysis in every VA procurement would render the goal-setting provision superfluous, as "the goal would be whatever number the Rule of Two produces, regardless of the Secretary's preference." Maj Op. at 17. The majority seemingly believes it is bad policy to require an agency to continue efforts to award contracts to small businesses once its participation goals are met, overlooking that participation goals are aspirations, not destinations. Indeed, the FAR explicitly provides that an agency may not refuse to set aside an acquisition solely on the basis that small businesses are "already receiving a fair proportion of the agency's contracts for supplies and services." FAR 19.502-6(f).

The mischief feared by the majority is further refuted by the discretion retained by contracting officers in how they perform a Rule of Two analysis. Because the Rule of Two requires contracting officers to set aside an acquisition *only* if they have a reasonable expectation that (i) offers will be made by at least two responsible small businesses, and (ii) award will be made at fair market prices, contracting officers are entitled to exercise their business judgment in determining whether these two conditions are met. *See* 38 U.S.C. § 8127(d); FAR 19.502-2. The contracting officer's decision not to set aside a procurement is subject to a "highly deferential rational basis review" and will not be overturned absent a showing that his or her business judgment was unreasonable.[11] The contracting

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[11] *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013); *see also Information Ventures, Inc.*, B-294267, 2004 CPD ¶ 205 (Comp. Gen. Oct. 8, 2004); *Benchmade Knife Co., Inc. v. United States*, 79 Fed. Cl. 731, 738 (2007).

officer is not required to use any particular method of assessing small business availability, and factors such as "prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement." *Raven Servs. Corp.*, B-243911, 91-2 CPD ¶ 203 (Comp. Gen. Aug. 27, 1991). The Rule of Two, therefore, does not diminish the contracting officer's discretion to ultimately conclude that there is (or is not) a reasonable basis for setting aside any given procurement for small businesses.

The majority's reticence to requiring agency advancement of small business participation beyond the aspirational goals is due to a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals. The former is undertaken by the contracting officer on a contract-by-contract basis, while the latter are set by the head of the agency and inform the agency's entire procurement process. Under the majority's rationale, the participation goals established under the Small Business Act would also be rendered superfluous by the FAR's existing Rule of Two requirement, which applies in nearly every acquisition. *See* 15 U.S.C. § 644(g)(1); FAR 19.502-1. Such an outcome would overturn more than thirty years of federal procurement law upholding the Rule of Two as a legitimate method of ensuring that agencies award a "fair proportion" of contract dollars to small businesses.[12] In

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[12] *See, e.g., Adams & Associates, Inc. v. United States*, 741 F.3d 102, 110 (Fed. Cir. 2014) (rejecting the argument that a "'fair proportion' determination must be made on a contract-specific basis"); *Delex Sys., Inc.*, B-400403, 2008 CPD ¶ 181 (Comp. Gen. Oct. 8, 2008) (noting that "[t]he origin of the Rule of Two predates the FAR" and that "it has been adopted as the FAR's implementation

fact, the FAR requires agencies to conduct a Rule of Two analysis under FAR 19.502-2 regardless of whether the agency's "small business goals have already been satisfied." *LBM, Inc.*, B-290682, 2002 CPD ¶ 157 (Comp. Gen. Sept. 18, 2002).

The real mischief here is that the majority opinion would saddle contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been "met" before the end of the fiscal year. Participation goals require agency officials to consider a range of factors in their broader acquisition policies well before a solicitation is issued or an individual contract is contemplated. The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act.

V.

In sum, the majority adopts an untenable construction of the 2006 Veterans Act by holding that the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met. The majority's holding deprives the Rule of Two mandate of its force and effect, it impedes congressional objectives regarding set asides, and it renders § 8127(d) inoperative and unnecessary. For these reasons, I *dissent*.

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of the [Small Business] Act's requirements"); *Federal Acquisition Regulation (FAR) "Rule of Two"*, 49 Fed. Reg. 40,135, 40,136 (Oct. 12, 1984) ("This method of implementing the fair proportion of total contracts has been upheld by the Courts and the Comptroller General.").

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 12-173C

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

November 27, 2012

[107 Fed. Cl. 226]

Bid Protest; Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127–28 (2006 & West Supp. 2012); Veteran-Owned Small Business Set-Asides; *Chevron* Statutory Interpretation

* * *

OPINION

FIRESTONE, *Judge.*

Plaintiff Kingdomware Technologies, Inc. ("plaintiff"), a service-disabled veteran-owned small business, brings this bid protest claim seeking injunctive relief compelling the Department of Veterans Affairs ("VA") to comply with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-

28 (2006 & West Supp. 2012) ("the 2006 Act" or the "Act"). Plaintiff filed an amended complaint on July 18, 2012, alleging that VA conducted three procurements in violation of the 2006 Act by failing to set aside those procurements for veteran-owned small businesses ("VOSBs") or service-disabled veteran-owned small businesses ("SDVOSBs"), such as plaintiff. For the purposes of the pending cross-motions for judgment on the administrative record, the parties have stipulated to the facts in regard to one of the three procurements at issue. The parties' cross-motions focus only on the legal question of whether VA failed to comply with the 2006 Act in conducting this procurement.[1] For the reasons that follow, the court **GRANTS** the government's motion for judgment on the stipulated facts, and **DENIES** plaintiff's motion.

I. STATUTORY AND REGULATORY FRAMEWORK

This case turns on a question of statutory interpretation: whether, under the 2006 Act, VA must first determine if it can conduct its acquisitions using restricted competition among SDVOSBs or VOSBs before deciding to use another procurement method, the Federal Supply Schedule ("FSS"), to meet its requirements. In particular, the court must determine whether Congress intended that VA retain its discretion to procure goods

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[1] In its cross-motion for judgment on the stipulated facts, the government also argued that Kingdomware was not verified by VA as an eligible SDVOSB or VOSB as required by the 2006 Act, and was therefore ineligible for award under the Act. Def.'s Cross-Mot. at 2. This database error has since been corrected, and plaintiff is now listed as a certified SDVOSB. *See* Pl.'s Resp., Ex. 5. The government no longer disputes that plaintiff is a certified SDVOSB under the 2006 Act. Def.'s Reply at 14 n.2.

and services from the FSS, in light of the set-aside procedures set forth in the 2006 Act. If Congress is silent as to this issue, the court must determine whether VA's interpretation, that it does not to need consider restricted competition among SDVOSBs and VOSBs before procuring from the FSS, is reasonable with regards to the statutory language, purpose, and legislative history of the 2006 Act. The answer to this question depends on the terms and structure of the Act itself, and on Congress' understanding of the relationship between the Act and the procurement methods available to VA under the Federal Acquisition Regulations. In several decisions, the Government Accountability Office ("GAO") has taken the position that the legislation and its regulations mandate that VA must determine whether it can set aside each of its procurements for restricted competition among SDVOSBs and VOSBs before using the FSS. VA has elected not to follow the GAO decisions, including in the present case.[2]

This particular question of statutory interpretation is a case of first impression before this court. To better understand the dispute over the proper interpretation of the 2006 Act, the court sets forth below the statutory and regulatory framework relevant to the FSS procurement at issue together with the GAO precedent and VA's response.

A. The Federal Supply Schedule.

Federal agencies traditionally procure supplies using full and open competition to ensure that the public receives the best value possible, using procedures out-

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[2] GAO decisions are not binding authority, but may be "instructive in the area of bid protests." *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009).

lined in the Federal Acquisition Regulations ("FAR"). *See* 48 C.F.R. ("FAR") § 14.000 *et seq.* (sealed bidding procedures); FAR § 15.000 *et seq.* (negotiated acquisition procedures). Individual agencies, including VA, are permitted to deviate from the general FAR. *See* FAR § 814.104 *et seq.* (containing sealed bidding procedures unique to VA); FAR § 815.303 (containing negotiated acquisition procedures unique to VA); FAR § 819.7001 *et seq.* (implementing in part the 2006 Act at issue here). VA's unique acquisition regulations are referred to as the Veterans Affairs Acquisition Regulations ("VAAR").

When procuring supplies or services, an agency may be required to use certain sources or set aside procurements for certain types of contractors. *See* FAR § 8.002 (listing the order of priority when ordering supplies and services). FAR Part 19 includes provisions relating to contract set-asides for small businesses generally and for certain types of small businesses, such as women-owned small businesses or economically-disadvantaged small businesses. *See* FAR § 19.000(a)(3). These set-aside provisions also include set-asides for SDVOSBs,[3] such as plaintiff, pursuant to the Veterans Benefit Act of 2003, 15 U.S.C. § 657f (2006).[4] FAR Part 19 mandates that small business set-

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[3] FAR Part 19 also recognizes VOSBs, *see* FAR § 19.201(a) ("It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, *veteran-owned small business*, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.") (emphasis added), although no separate VOSB program like the set-aside program for SDVOSBs is found in FAR Part 19.

[4] The Veterans Benefit Act of 2003 states, in part:

asides be used within or over certain contracting thresholds when the contracting officer reasonably expects to receive offers from two or more responsible businesses and the award will be competitive or awarded at fair market price. FAR § 19.502-2(a), (b). In addition, contracting officers conducting acquisitions over certain contracting thresholds must preference several specialized small business set-aside programs, including that for SDVOSBs, before using a general small business set-aside. FAR § 19.203(c). Small business set-asides have priority over acquisitions using full and open competition. FAR § 19.203(e).

Although the traditional acquisition and set-aside procedures described above are appropriate for many acquisitions, it is often inefficient to use these methods for smaller acquisitions. To provide federal agencies with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying," the General Services Administration ("GSA") has established the Federal Supply Schedule ("FSS"). FAR § 8.402(a). Contractors agree to provide supplies and services at stated prices for given periods of time on the FSS, permitting federal agencies to buy supplies directly from the FSS, rather than holding a publicly-advertised full and open competition for every individual requirement. *Id.* Orders placed against the FSS

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657f(b).

are deemed to satisfy the conditions of full and open competition and are not subject to the requirements of traditional procurement procedures, including the set-aside requirements established in FAR Part 19. FAR § 8.404(a).

Agency discretion to use the FSS is usually unrestricted. Absent a statutory or regulatory requirement to the contrary, an agency generally retains unfettered discretion to select the procurement method it wishes to use and in particular, whether it wishes to meet its acquisition requirements using the FSS. *K-Lak Corp. v. United States*, 98 Fed. Cl. 1, 8 (2011) (quoting *Tyler Constr. Grp. v. United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009)) ("Federal procurement entities have 'broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation.'"). Importantly for this case, it is well-settled that when placing an order against the FSS, the agency is exempt from the small business set-aside programs under FAR Part 19. FAR §§ 8.404(a), 8.405-5(a), 19.502-1(b); *see K-Lak*, 98 Fed. Cl. at 2 n.3 ("[T]he Small Business Program rules in FAR Part 19 do not apply to orders placed against and fully within the scope of existing FSS contracts.").

The FSS has therefore been historically utilized as a procurement method separate and apart from traditional procurement methods and set-aside provisions found elsewhere in the FAR. The parties' dispute in this case centers on whether the language of the 2006 Act alters the traditional relationship between the FSS and small business set-asides by mandating that VA first determine whether it can set aside all of its procurement activities for restricted competition among SDVOSBs and VOSBs before deciding to meet its re-

quirements through the FSS. The court now turns to the 2006 Act and its implementing regulations.

B. The 2006 Act and its regulations.

1. The 2006 Act.

Congress enacted the Veterans Benefits, Health Care, and Information Technology Act as Sections 502 and 503 of Public Law 109-461 in 2006.[5] The 2006 Act applies only to supplies and services procured by VA. *See* 48 C.F.R. § 819.7002 ("This subpart [implementing the 2006 Act] applies to VA contracting activities and to its prime contractors."); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010). The 2006 Act requires VA to set goals for SDVOSB and VOSB participation in VA contracts, and provides for several contracting tools, including set-asides and noncompetitive procurement procedures, to achieve the goal of increasing SDVOSB and VOSB participation. Plaintiff's protest centers on whether, under § 8127(d) of the 2006 Act, VA is required to conduct market research to determine if VA procurements should be set aside for SDVOSBs or VOSBs before VA acquires supplies and services using the FSS. Section 8127 of the 2006 Act reads, in relevant part:

> **(a) Contracting goals.**—(1)In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

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[5] The 2006 Act was amended in 2008, 2010, 2011 and 2012, but those amendments do not affect the portions of the Act relevant in this case.

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1) (A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1) (B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

...

(b) Use of noncompetitive procedures for certain small contracts.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41 [currently, $100,000), a contracting officer of the Depart-

ment may use procedures other than competitive procedures.

(c) **Sole source contracts for contracts above simplified acquisition threshold.**—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41 [currently $100,000]) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) **Use of restricted competition.**—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award

> can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127. The language in § 8127(d) stating that a contracting officer must have "a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price" is often referred to as the "Rule of Two." *See Distrib. Solutions, Inc. v. United States*, 104 Fed. Cl. 368, 390 (2012). The "Rule of Two" is common among small business set-aside procedures. *See, e.g.*, FAR § 19.502-2(b); *Distrib. Solutions*, 104 Fed. Cl. at 390. A contracting officer conducts market research, such as by searching through a database of small businesses, to determine whether the "Rule of Two" is satisfied. *See* 48 C.F.R § 810.001 (a VAAR instructing a VA contracting team to conduct market research using the database for SDVOSBs and VOSBs).

Section 8127(i) of the 2006 Act also prioritizes SDVOSBs and VOSBs for VA contracts over other small business contracting preferences, such as those outlined in FAR Part 19, that VA may use:

> **(i) Priority for contracting preferences.**—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:
>
> (1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.
>
> (2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned

and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

Id. § 8127(i).

Finally, § 8128 of the 2006 Act, also addressing contracting preferences, states, in part:

(a) **Contracting priority.**—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

Id. § 8128(a).

2. Regulations implementing the 2006 Act.

The VAAR implementing the 2006 Act can be principally found at 48 C.F.R. ("VAAR") Part 819. The regulations acknowledge the goal-setting provision of the Act in VAAR § 819.201: "The Secretary shall establish goals for each fiscal year for participation in Department contracts by SDVOSBs and VOSBs." The VAAR further state that "Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and

those owned and controlled by veterans for VA." VAAR § 819.7001(a). The VAAR explain that the "purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs." *Id.* § 819.7001(b).

VAAR Subpart 819.70 implements the portions of the Act at issue here. First, the regulations state that the 2006 Act applies to "VA contracting activities and to its prime contractors," and outline the eligibility requirements for SDVOSBs and VOSBs. VAAR §§ 819.7002-03. Next, VAAR § 819.7004 echoes the list of priorities found in § 8127(i) of the 2006 Act:

> In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:
>
> (a) To SDVOSBs;
>
> (b) To VOSB, including but not limited to SDVOSBs;
>
> (c) Pursuant to—
>
> (1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or
>
> (2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and
>
> (d) Pursuant to any other small business contracting preference.

VAAR § 819.7005 then implements the terms of the 2006 Act in regard to SDVOSBs, and in particular the "Rule of Two," stating, in relevant part:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106 [involving contracts exceeding the micro-purchase threshold up to $5 million], 819.7007 [involving awards to SDVOSBs of under $5 million on a sole source basis] and 819.7008 [involving awards to VOSBs of under $5 million on a sole source basis], the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

VAAR § 819.7006 contains an identical provision for VOSBs. The remainder of VAAR Subpart 819.70 deals with sole source awards to SDVOSBs and VOSBs, and the contract clauses that a contracting officer must include in solicitations and contracts for acquisitions under Subpart 819.70. VAAR §§ 819.7007-09. Several other scattered portions of the VAAR implement other parts of the 2006 Act. *See, e.g.*, VAAR § 802.101 (laying out definitions applicable to the VAAR implementing the Act). The VAAR themselves do not expressly address the relationship between the 2006 Act and the FSS. Rather, as discussed *infra*, VA has taken the position in the preamble to the VAAR that the 2006 Act does not apply when VA elects to use the FSS to meets its acquisition needs.

C. The GAO's *Aldevra* decision and VA's response.

On October 11, 2011, the GAO sustained a protest by Aldevra LLC, a SDVOSB challenging VA's use of the FSS before considering SDVOSB and VOSB set-asides in acquiring one skillet, one food slicer, and three griddles for two VA medical centers. *Aldevra*, B-405271 *et al.*, 2011 WL 4826148, at * 1 (Comp. Gen. Oct. 11, 2011). VA conceded that there were at least two SDVOSBs capable of meeting the requirements under the challenged solicitations. *Id.* at *2. Aldevra argued that based on the terms of the 2006 Act and the VAAR, VA had to conduct market research to consider SDVOSBs and VOSBs before acquiring these items from the FSS. *Id.* at * 1. VA argued in response that it retained its discretion under the Act to determine whether to use the FSS as opposed to SDVOSB or VOSB set-asides. *Id.* at *2. VA in particular relied on the preamble to the final VAAR implementing the Act, in which VA rejected a proposed revision to the VAAR that would have expressly stated that the set-asides and sole source provisions do not apply at the FSS order level. *Id.* at *3. In rejecting that revision to its rule, VA explained that the rule does not apply to the FSS and stated in its rulemaking proceedings that:

> We disagree with the commenter and reject the suggestion because this rule does not apply to FSS task or delivery orders. VA does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs,

> which states that set-asides do not apply to FAR part 8 FSS acquisitions.

Id. at *3; VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009) (emphasis added).

In interpreting the 2006 Act and its regulations, the GAO rejected VA's interpretation of the 2006 Act and VA's implementing regulation preamble. The GAO found that VA, before electing to use the FSS, must conduct market research to determine whether two or more SDVOSBs or VOSBs are capable of performing the requirements of the challenged solicitations, and, if so, that VA must set aside the solicitations for limited competition. *Aldevra*, 2011 WL 4826148, at *3. The GAO found "nothing in the [2006] Act or the VAAR that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs." *Id.* at *2. Instead, based on the use of "shall" in both § 8127(d) of the 2006 Act and the implementing VAAR, the GAO found that "the [2006] Act and the VAAR are unequivocal; the VA shall award contracts on the basis of competition restricted to SDVOSBs" where the conditions under the statute and regulations are met. *Id.* The GAO also found that FAR Part 8's provision that FSS procurements are exempt from FAR Part 19 set-asides only pertains to SDVOSB set-asides under the Veterans Benefit Act of 2003—which applies government-wide—and not to the 2006 Act, which relates only to VA procurements. *Id.* at *3-4. In distinguishing the two acts, the GAO further found that, in contrast to the 2006 Act, the language in the Veterans Benefit Act of 2003 used the permissive "may" rather than "shall" in directing a contracting of-

ficer to award contracts based on the "Rule of Two" for SDVOSBs. *Id.* at *4, *see supra* note 4. For these reasons, the GAO recommended in *Aldevra* that VA cancel and re-solicit the challenged solicitations using an SDVOSB set-aside. *Id.*

Following the *Aldevra* ruling, VA issued a memo to all VA acquisition and procurement officials stating that the GAO's recommendation and its interpretation of the 2006 Act should not be followed.[6] VA instructed its acquisition officials to continue using the FSS in line with VA's interpretation of the 2006 Act as inapplicable to FSS procurements. The GAO has since followed the rationale of *Aldevra* in several other protests, including plaintiff's protest before the GAO regarding the procurement at issue in this case, and VA has consistently declined to follow GAO's recommendation. *See, e.g.*, *Kingdomware Techs.*, B-406507, 2012 WL 1942256, at *1 (Comp. Gen. May 30, 2012).

The GAO has not, however, consistently rejected VA's decision to use the FSS without first applying the "Rule of Two" analysis. In another recent protest, the GAO held that VA may use the FSS first if it undertakes the "Rule of Two" analysis in selecting among FSS vendors. *Crosstown Courier Serv., Inc.*, B-406336, 2012 WL 1405913, at * 1 (Comp. Gen. Apr. 23, 2012). In particular, the GAO held that nothing in § 8127(d) "requires VA to conduct its market research exclusively on the open market, as opposed to among FSS vendors.... Thus, the agency's initial decision to conduct market research confined to FSS vendors was not, in

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[6] Under the Competition in Contracting Act, 31 U.S.C. § 3554(b), GAO decisions are only recommendations and not binding on VA. *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186, 196 n.21 (2011).

and of itself, objectionable, to the extent that the VA sought to determine whether there were two or more SDVOSB (or VOSB) FSS vendors capable of meeting its requirement." *Id.* at *2. Based on these decisions, uncertainty remains as to when and how VA must apply the set-aside procedures outlined in the 2006 Act.[7]

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[7] To further complicate the issue, the GAO also found in *Alternative Contracting Enterprises, LLC*, B-406265 *et al.*, 2012 WL 989288 (Comp. Gen. Mar. 26, 2012), that because the 2006 Act is silent as to the effect of its set-aside provisions on "AbilityOne" contracting set-asides—a separate, mandatory contracting preference for nonprofits for the blind or severely disabled—VA reasonably interpreted that "AbilityOne" contractors maintained their priority over SDVOSBs and VOSBs notwithstanding the terms of the 2006 Act. The GAO deferred to VA's interpretation of its regulations in the preamble of the regulations implementing the 2006 Act and to VA's internal guidelines. *Id.* This court has similarly deferred to VA's interpretation of these statutory preferences in light of the Act's silence. *Angelica Textile*, 95 Fed. Cl. at 222.

In denying a request for reconsideration of the *Alternative Contracting* decision, the GAO distinguished its decision in *Aldevra*, stating that the *Alternative Contracting* case involved VA's reasonable interpretation of two unambiguous but conflicting statutory mandates, while *Aldevra* involved "the interpretation of the VA Act without reference to other statutory preferences," and that under *Aldevra*, "the VA's elevation of FSS acquisitions over SDVOSB and VOSB set-asides" was inconsistent with the plain meaning of the 2006 Act. *Pierce First Med.*, B-406291.3 *et al.*, 2012 WL 2150219, at *3-4 (Comp. Gen. June 13, 2012). The VA also went on to disagree with the protesters' argument that "the VA Act preference operates without regard to any other provision of law." *Id.* at *4. Rather, the GAO found that, at least with regard to small business set aside priorities, the VA Act "anticipates the operation of other statutory preferences." *Id.*

II. STIPULATED FACTS AND PROCEDURAL HISTORY

The following facts have been stipulated to by the parties. In January 2012, VA determined that it needed to procure an Emergency Notification Service ("ENS") for the Veterans Integrated Service Network 5, a grouping of four VA medical centers and associated outpatient clinics. The purpose of an ENS is to rapidly deliver messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster. The proposed contract was intended to provide ENS services only until a VA-wide notification system is implemented, which is anticipated to occur during fiscal year 2012.

VA's contracting officer decided to satisfy VA's requirements under FAR Subpart 8.4 using the FSS. The VA contracting officer conducted market research under FAR Subpart 8.4 and identified three possible sources for the ENS on the FSS. However, the contracting officer determined that none of the three sources could meet VA's requirements, and a limited source FSS justification was conducted in accordance with FAR § 8.405-6.

On or about February 14, 2012, the contracting officer sent Request for Quote VA245-12-Q-0078 ("RFQ") to FSS vendor Everbridge, Inc. ("Everbridge") to solicit a quote for ENS services. The RFQ included one base year and two option years. Everbridge submitted a quote of $33,824.10 for the base year of March 1, 2012 through February 28, 2013; $33,824.10 for option year one, if exercised, and $33,824.10 for option year two, if exercised. On February 22, 2012, after having determined that Everbridge offered a fair and reasonable price, the contracting officer awarded a task order con-

tract to Everbridge pursuant to its FSS blanket purchase agreement for the base year at $33,824.10 and a total amount of $101,472.30 if both options years were exercised.

The contracting officer posted the contract award to the Federal Procurement Data System-Next Generation reporting system. Thereafter, on March 14, 2012, plaintiff filed a bid protest with the GAO objecting to the award on the basis that VA allegedly had not complied with the 2006 Act because it had not set aside the contract for limited competition among SDVOSBs before using the FSS. *Kingdomware Techs.*, B-406507, 2012 WL 1942256, at *1 (Comp. Gen. May 30, 2012). On May 30, 2012, the GAO issued a decision sustaining the protest for the reasons discussed in the *Aldevra* opinion.[8] *Id.* On August 8, 2012, VA responded to the GAO and Kingdomware that VA would decline to follow the GAO's recommendations in its decision.

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[8] This opinion also states that VA "conducted market research in connection with this procurement and found that there were at least 20 SDVOSBs that could perform the requirements at issue." *Kingdomware Techs.*, 2012 WL 1942256, at *1. Plaintiff asserts that this demonstrates that VA knew SDVOSBs were capable of performing the contract at issue. The government in response contends that the research was conducted in 2008 for the original ENS procurement, not the procurement currently being protested. Def.'s Cross-Mot. at 9 n.4. The government further argues that even if SDVOSBs were on the FSS for this type of contract, this does not mean they were qualified to perform the stipulated contract. *Id.* For the purposes of these cross-motions, the court will disregard this dispute. Even if VA did perform market research that revealed two or more SDVOSBs capable of performing the services, the fact remains that VA chose to order against the FSS for the services at issue here, and the only question before the court is whether ordering against the FSS before setting aside the contract for SDVOSB restricted competition was permissible under the terms of the 2006 Act.

On March 15, 2012, plaintiff filed its initial complaint in this court. On July 18, 2012, plaintiff filed an amended complaint alleging that VA conducted three procurements in violation of the 2006 Act by failing to set aside those procurements for VOSBs and SDVOSBs, including plaintiff. At a status conference held on August 21, 2012, the parties agreed to select one of the three claims for which they would not dispute the underlying administrative record, and submit cross-motions for judgment on the stipulated facts that focused on the sole legal question of whether the 2006 Act mandates that VA conduct procurements in accordance with § 8127(d) of the Act before ordering against the FSS.

In its cross-motion, plaintiff argues that the GAO is correct in finding that the 2006 Act mandates that VA first determine whether SDVOSB or VOSB set-asides should be used before VA can order against the FSS. The government argues in response that the 2006 Act is only a goal-setting statute and simply provides VA with tools to meet the SDVOSB and VOSB contracting goals set by the Act. The government contends that nothing in the 2006 Act restricts VA's discretion to order against the FSS.

For the reasons discussed below, the court disagrees with plaintiff and the GAO, and finds that VA need not comply with the "Rule of Two" under § 8127(d) of the Act before using the FSS to meet its procurement needs.

III. STANDARD OF REVIEW

The applicable standard of review in a bid protest is provided by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) and is highly deferential. *Advanced Data Concepts, Inc. v. United States*, 216

F.3d 1054, 1058 (Fed. Cir. 2000). The court's review is limited to determining whether an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Al Andalus Gen. Contracts Co. v. United States*, 86 Fed. Cl. 252, 262 (2009) (quoting *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350-51 (Fed. Cir. 2004)). Under this standard, the plaintiff bears a "heavy burden." *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996). "[A] bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001). Plaintiff's bid protest is based upon an alleged violation of law. When challenging a procurement on this ground, "the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations." *Id.* at 1333 (internal quotations omitted).

IV. DISCUSSION

A. The *Chevron* framework.

The parties agree that this case only involves a question of statutory interpretation: whether the terms of the 2006 Act mandate that VA set aside every acquisition for SDVOSBs or VOSBs if two or more SDVOSBs or VOSBs can provide a fair and reasonable price for the contract before meeting its requirements using the FSS. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides the framework for deciding the statutory interpretation question presented in this case. Under *Chevron*, this court first must determine "whether Congress has directly spoken to the precise question at issue. If

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842. To determine the intent of Congress, the court looks to the language of the statute itself. *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). Beyond the statute's text, tools of statutory construction may be used, including the statute's structure, canons of statutory construction, and legislative history. *Id.*; *see also Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

However, "if the statute is silent or ambiguous with respect to the specific issue," a court must proceed to the second step of *Chevron*, which is to ask whether the implementing agency's interpretation of the statute is reasonable. *Id.* at 843; *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365, 1369 (Fed. Cir. 2010). The court must not "impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote omitted). Rather, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citation omitted).

In determining whether an agency's interpretation of a statute is reasonable, an agency's construction is entitled to deference if it is not in conflict with the plain language of the statute or the congressional intent or

purpose of the statute. *See Nat'l R.R. Passenger Corp. v. Boston and Me. Corp.*, 503 U.S. 407, 417 (1992) ("If the agency interpretation is not in conflict with the plain language of the statute, deference is due."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 126 (1985) ("We should defer to [the agency's] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress."). In addition, an agency's interpretation of a particular statutory provision qualifies for *Chevron* deference when that interpretation is reached through formal proceedings, such as by an agency's power to engage in notice-and-comment rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007).

Even where an agency's interpretation of a statute was not promulgated in the exercise of making rules with the force of law, that agency interpretation may still be entitled to deference according to its persuasiveness. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Sursely v. Peake*, 551 F.3d 1351, 1355 (Fed. Cir. 2009). While this standard does not entail the same degree of deference as the *Chevron* standard, it requires courts to give some deference to informal agency interpretations of ambiguous statutes, based on "the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228. The court will consider the specialized experience of the agency and "the value of uniformity in its administrative and judicial under-standings of what a national law requires." *Id.* at 234. The degree of deference afforded to an agency's informal interpretation of a statute will also

depend on its "thoroughness, logic, and expertise, its fit with prior interpretations, and any other source of weight." *Id.* at 235.

In addition, an agency's interpretation of its own regulations is entitled to substantial deference when that regulation is ambiguous or silent on the issue in question. *Price v. Panetta*, 674 F.3d 1335, 1341-42 (Fed. Cir. 2012) (citations omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). That degree of deference applies even when the agency's interpretation is offered in the litigation in which the argument in favor of deference is made, as long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; *see also Panetta*, 674 F.3d at 1342 (citations omitted). However, an interpretation prompted by litigation and that is unsupported by regulations, rulings, or administrative practice is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

B. The 2006 Act is silent as to its application to the FSS and as a "goal-setting" statute is ambiguous as to the discretion reserved to VA.

As noted above, under the first step of the *Chevron* analysis, the court must first determine whether Congress has spoken directly to the issue of whether VA must first determine if the "Rule of Two" is satisfied—that is, whether the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States—before ordering against the FSS.

Plaintiff principally argues that the 2006 Act is unambiguous, and thus this court's inquiry should stop at *Chevron* step one. Specifically, plaintiff contends that the plain language of the 2006 Act expresses Congress' intent that VA, for every acquisition, must conduct market research to determine whether it must set aside that procurement for SDVOSBs or VOSBs before awarding a contract using a different procurement method. Plaintiff relies on the language of § 8127(d), which states that "for the purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall award* contracts on the basis of competition restricted to small business concerns owned and controlled by veterans ...." (emphasis added). Plaintiff argues that the use of the phrase "shall award" in this instance—in contrast to the use of "may award" in subsections (b) and (c) of § 8127—unequivocally establishes a mandatory set-aside. Pl.'s Mot. at 12 (citing *United States v. Thoman*, 156 U.S. 353, 360 (1895)).

Plaintiff argues that its view is supported by a line of cases concerning the HUBZone set-aside, a small business set-aside authorized by the Small Business Act, 15 U.S.C. § 657a.[9] *See generally DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010); *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386, 411 (2010); *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Hawai'i 2003). The HUBZone cases involved the issue of whether the Small Business Act

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[9] A HUBZone is a "Historically Underutilized Business Zone." 15 U.S.C. § 632(p)(1). The purpose of the HUBZone program is to "provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones ...." FAR § 19.1301(b).

granted priority to the HUBZone program over another small business set-aside program called the Section 8(a) program, which assists small businesses owned and controlled by socially and economically disadvantaged individuals. The application of the FSS was not at issue in these cases. Rather, courts were called on to decide whether Congress, by stating that "notwithstanding any other provision of law," agencies "shall award" to qualified HUBZone businesses, intended to create a super priority for HUBZone businesses.[10] The statutory language provided:

> *Notwithstanding any other provision of law* ... a contract opportunity *shall be awarded* pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657a(b)(2) (prior version, amended in 2010) (emphasis added); *see DGR*, 94 Fed. Cl. at 204 (holding that the Small Business Act grants priority to the HUBZone program); *Contract Mgmt.*, 291 F. Supp. 2d at 1173 (same); *Mission Critical*, 91 Fed. Cl. at 411 (holding that the HUBZone program takes priority over other small business programs). Plaintiff argues that the 2006 Act is like the HUBZone provision of the Small Business Act because it also uses the phrase "shall award" in directing the agency to award contracts based on the "Rule of Two." Plaintiff concludes

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[10] The statutory language of the Small Business Act relied on by the courts in the HUBZone cases has since been removed by an 2010 amendment.

that the 2006 Act therefore created a mandatory set-aside for SDVOSBs and VOSBs without any exceptions or exclusions.

The government contends that the 2006 Act is a goal-setting statute that does not require VA to set-aside every contract for SDVOSBs and VOSBs where two or more could provide a fair and reasonable price. Rather, the government argues, the phrase "shall award" in the 2006 Act must be read against the Act's goal-setting context. The government asserts, when read as a whole, the Act provides that a contracting officer need only use SDVOSB and VOSB set-asides when it is necessary "for purposes of meeting the goals" established by the Secretary. 38 U.S.C. § 8127(b), (c), (d). According to the government, the 2006 Act gives VA discretion to determine when it will use the set-aside procedures found in the Act to meet those goals. To interpret the statute otherwise, the government argues, would render § 8127(a), the goal-setting provision, meaningless, because a mandatory set-aside procedure would obviate the need for goals.[11]

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[11] In addition, the government contends that when the 2006 Act is read as a whole, the distinction between "may award" in subsections (b) and (c) and "shall award" in subsection (d) of § 8127 does not support plaintiff's position. Instead, the government argues, the use of "may" and "shall" in the Act distinguishes among the procedures VA may use to award contracts to SDVOSBs and VOSBs once it decides that it will set aside a contract under the Act. The government contends that a rational reading of the all of the terms of the Act demonstrates that, only when VA chooses to award a contract to meet the goals of the Act, VA is required to use restricted competition between SDVOSBs or VOSBs, unless the contracting officer decides to use the non-competitive procedures that meet the requirements outlined in sub-sections (b) and (c).

The government further argues that, given the 2006 Act's silence in regard to the FSS, VA's procurement discretion extends to its decisions to use the FSS. The government concludes that if Congress had wanted to restrict VA's discretion to use the FSS, it could have. For example, the government argues, VA's discretion could be constrained if the 2006 Act contained the phrase "notwithstanding any other provision of the law," which was included in the HUBZone provision. However, Congress did not so restrict VA's discretion in the 2006 Act.

The government also charges that its reading of the 2006 Act, as opposed to plaintiff's reading, is supported by the Act's legislative history, which "demonstrates that Congress viewed this legislation as providing contracting officers the discretion to set-aside procurements, not a mandate that they always do so." Def.'s Cross-Mot. at 15. The government argues that Congress' Joint Explanatory Statement discussing the meaning of § 8127(b)-(d) reflects Congress' intent that VA would retain discretion over choosing to set aside contracts for SDVOSBs or VOSBs:

> VA would be allowed to award non-competitive contracts to small businesses owned and controlled by veterans when the amount of the contract is below the simplified acquisition threshold as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. s 403). Further, contracting officers would be allowed, but not required, to award sole source contracts to small businesses owned and controlled by veterans to meet the annual goal set by the Secretary for contracts above the simplified acquisition threshold but below $5,000,000. *Contracting officers would retain*

> *the option to restrict competition to small businesses owned and controlled by veterans* if the contracting officer has an expectation that two or more such businesses owned by veterans will submit offers for the contract including all contracts exceeding $5,000,000.

152 Cong. Rec. S11,609, S11,615 (daily ed. Dec. 8, 2006) (Joint Explanatory Statement as read into the record) (emphasis added). The Joint Explanatory Statement goes on to state:

> The intent of this provision [§ 8127] in the Compromise Agreement is to emphasize the importance of meeting the contracting goals for veteran and service-disabled veteran-owned businesses by giving those competitive parity with other set-aside categories. The Committees also seek *to give contracting officers the tools to meet veteran and service-disabled veteran-owned business set-aside goals.*
>
> The Committees anticipate that acquisition officials *will exercise reasonable judgment when attempting to meet the several set-aside goals* including giving "preference" to veteran or service-disabled veteran-owned businesses. The goals for veteran and service-disabled veteran owned businesses *are not in any way intended to prevent attainment of other set aside goals.*

Id. at S11,616 (emphasis added).

The government concludes that this legislative history clearly indicates Congress' intention to give VA the tools it needs to aid SDVOSBs and VOSBs in obtaining VA contracts when and if VA chooses to set

aside a contract to meet the 2006 Act's goals. Nothing in the legislative history, the government argues, suggests an intention by Congress to establish a mandatory set-aside program that would frustrate VA's attainment of other set-aside goals or limit its use of the FSS.

After consideration of the parties' arguments, the court agrees with the government that plaintiff's interpretation of the 2006 Act is not supported by the plain language of the Act. First, the 2006 Act must be construed in light of its goal-setting provisions and thus the statute is at best ambiguous as to whether it mandates a preference for SDVOSBs and VOSBs for all VA procurements. More specifically, the phrase "shall award" must be read in connection with the other terms in the 2006 Act, which demonstrate that the Act is goal-setting in nature: Subsection (a) of § 8127 directs the Secretary to set goals for SDVOSB and VOSB participation in VA contracts, and the sole source and set-aside requirements in the remainder of § 8127 are couched in terms of meeting those goals. *See* 38 U.S.C. § 8127(b), (c), and (d) (each qualifying its terms with the phrase "for purposes of meeting the goals of subsection (a)"). The Secretary's discretion to set contracting goals for SDVOSBs and VOSBs under the Act contradicts plaintiff's interpretation of the statute as creating a mandatory SDVOSB and VOSB set-aside procedure for each and every procurement. Contrary to plaintiff's argument, the goal-setting nature of the statute clouds the clarity plaintiff would attribute to the phrase "shall award" in subsection (d) of the Act, and renders the Act ambiguous as to its application to other procurement vehicles, such as the FSS.

Second, the 2006 Act is silent as to the relationship between its set-aside provision and the FSS and thus the specific issue in this case is not answered by the

plain words of the statute. In this connection, the court notes that, generally, the FSS is exempted from small business set-aside requirements under the FAR. *See* FAR §§ 8.404(a), 8.405-5(a), 19.502-1(b). In addition, the court cannot ignore the well-settled principle that Congress "can be presumed [to be] ... knowledgeable about existing law pertinent to legislation it enacts." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed. Cir. 1990) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)). Thus, in enacting the 2006 Act, the court must presume that Congress was aware of the historic exception of the FSS from small business set-asides and cannot presume, as plaintiff urges, that Congress intended to extinguish the exception by its silence.[12] The effect of the Act on FSS orders is a legislative gap left for the agency to fill.[13]

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[12] In this regard, the court rejects the GAO's analysis in *Aldevra*, where the GAO held that because FAR Part 19's SDVOSB set-aside provision was created as a government-wide program by the Veterans Benefit Act of 2003, "the exception in the FAR that permits agencies to award task and delivery orders under the FSS without regard to government-wide small business programs ... does not govern, or apply to, the SDVOSB set-aside program created by the Veterans Benefits, Health Care, and Information Technology Act of 2006." *Aldevra*, 2011 WL 4826148, at *4. While the Veterans Benefit Act of 2003 and the 2006 Act do create distinct set-aside programs, the 2006 Act itself is silent as to the relationship between its set-aside provision and the FSS. Therefore, the agency retained its discretion to determine whether and how the 2006 Act's set-aside procedures apply to FSS procurements, and, as discussed *infra*, reasonably concluded that, based on the traditional exemption of the FSS from small business set-asides, it would not apply the 2006 Act's terms to FSS orders.

[13] Legislation has since been proposed in the House of Representatives to "clarify the contracting goals and preferences of the Department of Veterans Affairs with respect to small business

Further, the legislative history of the Act undermines plaintiff's interpretation of the 2006 Act. The Joint Explanatory Statement accompanying the 2006 Act states that VA contracting officers "would retain the option to restrict competition to small businesses owned and controlled by veterans" if the "Rule of Two" is met, and that the Act was meant to give VA the "tools" to meet its SDVOSB and VOSB set-aside goals, but not to the detriment of other set-aside goals.[14] 152 Cong. Rec. at S11,615-16. Plaintiff's man-

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concerns owned and controlled by veterans." H.R. 4048, 112th Cong. § 2 (2012). That bill proposes to amend 38 U.S.C. § 8127 to insert the following section:

> (k) Applicability to Federal Supply Schedule—For purposes of meeting the goals under subsection (a), the Secretary shall include the acquisition of goods and services through the use of a Federal supply schedule of the General Services Administration.

Id.

[14] To the extent plaintiff relies on legislative history about the 2006 Act that occurred *subsequent* to the passage of the Act to argue to the contrary, the court agrees with the government that subsequent legislative history is not useful in determining the intent of the Congress that initially passed the 2006 Act. *See Colt Indus., Inc. v. United States*, 880 F.2d 1311, 1313 n.** (Fed. Cir. 1989) ("Subsequent legislative history is worthy of little weight."); *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1348 (Fed. Cir. 2001) ("It is well-established that 'the view of a later Congress cannot control the interpretation of an earlier enacted statute.'" (citing *inter alia O'Gilvie v. United States*, 519 U.S. 79, 90 (1996)).

In fact, the legislative history cited by plaintiff, which addresses whether the terms of the Act apply to FSS orders, serves to confirm that the statute is ambiguous in regard to this point. *See, e.g.*, Follow-up on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process: Hearing Before the Subcomm. on Oversight and Investigations and Subcomm. on Economic Opportunity of the H. Comm.

datory set-aside interpretation conflicts with the stated purpose of the Act in its legislative history.

Finally, the court finds that plaintiff's reliance on the HUBZone cases is misplaced. As an initial matter, as noted above, the HUBZone cases dealt with conflicting set-aside preferences under the Small Business Act, not the relationship between set-asides and procurement vehicles, such as the FSS. Moreover, the courts, in determining that the HUBZone set-aside program took priority over other set-aside programs in the Small Business Act, relied on the "shall be awarded" language in that statute as used in conjunction with the phrase "notwithstanding any other provision of law." *See DGR*, 94 Fed. Cl. at 206 ("It is the combination of the two phrases that creates a clear priority for the HUBZone program over the 8(a) program when the standards of the HUBZone program are satisfied."). The 2006 Act does not contain a similar unequivocal phrase that would operate to foreclose use of the FSS prior to satisfying the requirements of § 8127(d).

Taken as a whole, therefore, the court concludes that under *Chevron* step one, the 2006 Act is not plain on its face as to its application to the FSS and is ambiguous with regard to the discretion left to VA in meeting the 2006 Act's goals. The court must now ask whether the implementing agency's interpretation of the statute is reasonable. *Chevron*, 467 U.S. at 843. In this case, the court must determine if VA reasonably exercised the discretion afforded under the Act in deciding that the restricted competition provision of § 8127(d) would

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on Veterans' Affairs, 112th Cong. 19 (Nov. 30, 2011) (question of Bill Johnson, Chairman, H. Subcomm. on Oversight and Investigations) ("[The statute] does not talk about the Federal supply schedule or any of that.").

not operate to bar VA's use of the FSS to meet its procurement needs.

C. VA's interpretation of the 2006 Act is reasonable.

Plaintiff argues that, to the extent the language in the 2006 Act is ambiguous, VA has written an implementing regulation that clarifies this ambiguity by requiring VA to consider SDVOSB and VOSB set-asides for all acquisitions. In particular, plaintiff points to VAAR § 819.7005, which states:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106 [involving contracts exceeding the micro-purchase threshold up to $5 million], 819.7007 [involving awards to SDVOSBs of under $5 million on a sole source basis] and 819.7008 [involving awards to VOSBs of under $5 million on a sole source basis], *the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB* concerns upon a reasonable expectation that,
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> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

Id. (emphasis added). Plaintiff argues that the language "the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns" clearly creates a mandatory set-aside without any exceptions, and that this interpretation by VA, found in its regulations, is entitled to deference. Any other interpretation by VA, plaintiff argues, was developed on-

ly for the purposes of litigation and is not entitled to deference.

The government argues that plaintiff has mischaracterized the VAAR and that VA has reasonably decided to exclude FSS orders from application of the 2006 Act. The government asserts that VA's interpretation of the 2006 Act, as expressed in the preamble to the VAAR, is consistent with the statutory language and legislative history of the 2006 Act, which indicate that VA need not set aside each and every contract for SDVOSBs and VOSBs before ordering against the FSS. In regard to FSS procurements in particular, VA in the preamble of the final VAAR states:

> Comment: VA received a comment stating that the proposed rule was unclear whether it was intended to be applicable to task and delivery orders under the Federal Supply Schedule (FSS). The commenter indicated that although GSA has delegated to VA the authority to administer certain schedules, the delegation does not extend to policy implementation. The commenter recommended a revision stating that SDVOSB and VOSB set-asides and sole source provisions do not apply at the FSS order level.
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> Response: We disagree with the commenter and reject the suggestion because *this rule does not apply to FSS task or delivery orders.* VA does not believe a change to the regulation is needed, and 48 CFR part 8 procedures in the FAR will continue to apply to VA FSS task/delivery orders. Further, *VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small*

Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions.

VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009) (emphasis added). The government asserts that VA's position that the 2006 Act's regulations "do[] not apply to FSS task or delivery orders" is reasonable, and entitled to deference. The court agrees.

As the government argues, the VAAR are silent as to the role of the FSS in relation to the set-aside program established by the 2006 Act. Where the text of a regulation is unclear or silent, the court may look to the preamble of the regulation to determine the administrative construction of a regulation. *See Fidelity Fed. Sav. and Loan Ass'n v. Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("Although the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent."). As noted above, the preamble accompanying the final VAAR states that the VAAR "do[] not apply to FSS task or delivery orders," and that the regulatory framework of FAR Part 8 will continue to apply to VA's FSS orders. VA Acquisition Regulation, 74 Fed. Reg. at 64,624. The preamble further asserts, "Under this final rule, a VA contracting officer *may restrict competition* to contracting with SDVOSBs or VOSBs under certain conditions. *Likewise*, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implements these special acquisition methods as a change to the VA Acquisition Regulation (VAAR)." *Id.* at 64,619 (emphasis added). In explaining the reasons

for its rules, VA states in the preamble, "Specifically, this final rule *will allow VA contracting officers to* ... [r]equire set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States."[15] *Id.* at 64,628 (emphasis added).

The court recognizes that the preamble to the regulations lacks the formality of the regulations themselves, and is therefore not entitled to *Chevron* deference.[16] However, the agency's interpretation of the statute found in the preamble is still entitled to deference in so far as it has "the power to persuade," *Skidmore*, 323 U.S. at 140, based on the agency's consistency, formality, expertise and if the agency's determination fits with prior interpretations. *See Mead*, 533 U.S. at 228, 234-35.

VA's interpretation of its rules in the preamble indicate that VA interpreted the terms of the Act, and the VAAR, as having no effect on its ability to use the FSS without limitation. The court finds that this inter-

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[15] Similar language to the preamble of the final VAAR is found in the preamble to VA's proposed rules. *See* VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 73 Fed. Reg. 49,141, 49,144 (Aug. 20, 2008).

[16] In this regard, because both the statute and the regulations are silent as to the role of the FSS, the court construes the statement in the preamble to ultimately interpret the statute itself, not just the VAAR. However, to the extent that VA is interpreting its own regulations rather than the meaning of the statute in the preamble, that interpretation is entitled to substantial deference. *Auer*, 519 U.S. at 461-63; *Sursely*, 551 F.3d at 1355.

pretation is a reasonable use of the discretion implicitly granted by the statute, and is entitled to deference. VA's interpretation in the preamble has many of the characteristics favoring deference under *Skidmore v. Swift & Co.* First, VA's interpretation that the set-aside provisions of the 2006 Act do not apply to the FSS has remained consistent over time, and reflects a uniform approach on the part of the agency.[17] *Mead*, 533 U.S. at 234. Second, VA's interpretation is not directly in conflict with the Act or the VAAR, which are silent on the role of the FSS in meeting the goals set by the Secretary. VA's interpretation of its abilities under the Act is also consistent with the legislative history of the Act, which expresses the intent that VA retain "options" to award contracts to SDVOSBs and VOSBs, and that VA would "exercise reasonable judgment" in meeting the Act's set-aside goals alongside VA's other small business goal obligations. Third, while VA's explanation of its interpretation of the Act, found in the preamble, is brief, it made clear the basis of VA's position—the traditional exemption of the FSS from set-

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[17] Plaintiff argues that the government's particular position that it retains discretion to use the set-aside procurement methods in § 8127 of the Act if it chooses to meet the goals of the Act is a position developed only for litigation. However, because the government's argument is based, at bottom, on VA's preamble to its final rule, the court rejects this aspect of plaintiff's argument. Moreover, the VA press release plaintiff cites for the proposition that VA changed its position is consistent with VA's current position, stating that the 2006 Act "gave VA new authority 'for purposes of meeting [its] goals' for contracting with" SDVOSBs and VOSBs. Pl.'s Resp., Ex. 2. Finally, as noted above, to the extent that VA is interpreting its own regulations rather than the meaning of the statute in the preamble, that interpretation is entitled to substantial deference even if developed for litigation. *See supra* note 16.

aside programs—and was promulgated in the context of a notice-and-comment rulemaking procedure. Finally, VA's interpretation is consistent with the traditional relationship between set-asides and the FSS found in the FAR—namely, that agencies are not required to implement set-aside programs before or while using the FSS. *See K-Lak*, 98 Fed. Cl. at 8. Under these circumstances, the court finds that VA's interpretation of the statute, a reasoned interpretation made in the context of its notice-and-comment rule-making procedures, is entitled to deference.

In sum, the court respectfully disagrees with the GAO's interpretation of the 2006 Act in the case at hand, and finds that VA's decision not to set aside the ENS contract at issue was not arbitrary, capricious, or contrary to law. The government is therefore entitled to judgment on the stipulated facts as to this particular procurement action.

V. CONCLUSION

For the foregoing reasons, plaintiff's motion for judgment on the stipulated facts is **DENIED**, and the government's cross-motion is **GRANTED**. The parties shall submit a status report by **December 10, 2012** indicating next steps in this litigation regarding plaintiff's two remaining bid protest claims. In addition, the parties shall indicate in that same status report whether they would like the court to direct entry of judgment under Rule 54(b) of the Rules of the United States Court of Federal Claims.

IT IS SO ORDERED.

/s/ Nancy B. Firestone
NANCY B. FIRESTONE
JUDGE

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2013-5042

KINGDOMWARE TECHNOLOGIES, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER,[1] DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, *Circuit Judges*.*

PER CURIAM.

ORDER

Appellant Kingdomware Technologies, Inc. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by appellee United States. The petition was first referred as a pe-

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[1] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

* Circuit Judge Hughes did not participate.

tition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on September 17, 2014.

FOR THE COURT

September 10, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

APPENDIX D

UNITED STATES COURT OF
FEDERAL CLAIMS

No. 12-173C

KINGDOMWARE TECHNOLOGIES, INC.

v.

UNITED STATES

JUDGMENT

Pursuant to the court's Order for Entry of Judgment, filed December 12, 2012,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant as to all three of the procurements identified in plaintiff's amended complaint. Each party shall bear its own costs.

Hazel C. Keahey
Clerk of Court

December 18, 2012 By: s/ Lisa L. Reyes
Deputy Clerk

APPENDIX E

STATUTES AND REGULATIONS

15 U.S.C. § 644. Awards or contacts

* * *

(g) Goals for participation of small business concerns in procurement contracts

(1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service disabled[1] veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

* * *

Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economical-

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[1] So in original. Probably should be "service-disabled".

ly disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency.

(B) Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to perform such contracts and to perform subcontracts under such contracts.

(C) Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator for Federal Procurement Policy for final determination.

(D) For the purpose of establishing goals under this subsection, the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women.

(E) The head of each Federal agency, in attempting to attain the participation described in subparagraph (D), shall consider—

(i) contracts awarded as the result of unrestricted competition; and

(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 637(a) of this title.

(F)(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving small business goals.

(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.

15 U.S.C. § 657f. Procurement programs for small business concerns owned and controlled by service-disabled veterans

(a) Sole source contracts

In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if—

(1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;

(2) the anticipated award price of the contract (including options) will not exceed—

(A) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(B) $3,000,000, in the case of any other contract opportunity; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(b) Restricted competition

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by ser-

vice-disabled veterans will submit offers and that the award can be made at a fair market price.

(c) Relationship to other contracting preferences

A procurement may not be made from a source on the basis of a preference provided under subsection (a) or (b) of this section if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 or chapter 85 of title 41.

(d) Enforcement; penalties

Rules similar to the rules of paragraphs (5) and (6) of section 637(m) of this title shall apply for purposes of this section.

(e) Contracting officer

For purposes of this section, the term "contracting officer" has the meaning given such term in section 2101(1) of title 41.

38 U.S.C. § 8127. Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small busi-

ness concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) ELIGIBILITY OF SMALL BUSINESS CONCERNS.—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) DATABASE OF VETERAN-OWNED BUSINESSES.—(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business con-

cerns owned and controlled by veterans and the veteran owners of such business concerns.

(2)(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(g) ENFORCEMENT PENALTIES FOR MISREPRESENTATION.—(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

(h) TREATMENT OF BUSINESSES AFTER DEATH OF VETERAN-OWNER.—(1) Subject to paragraph (3), if the death of a veteran causes a small business concern to be less than 51 percent owned by one or more veterans,

the surviving spouse of such veteran who acquires ownership rights in such small business concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans.

(2) The period referred to in paragraph (1) is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(A) The date on which the surviving spouse remarries.

(B) The date on which the surviving spouse relinquishes an ownership interest in the small business concern.

(C) The date that is ten years after the date of the veteran's death.

(3) Paragraph (1) only applies to a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability.

(i) PRIORITY FOR CONTRACTING PREFERENCES.—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and

controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(j) APPLICABILITY OF REQUIREMENTS TO CONTRACTS.—(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(k) ANNUAL REPORTS.—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns

owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(*l*) DEFINITIONS.—In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" means a small business concern—

(A)(i) not less than 51 percent of which is owned by one or more veterans or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(ii) the management and daily business operations of which are controlled by one or more veterans; or

(B) not less than 51 percent of which is owned by one or more veterans with service-connected disabilities that are permanent and total who are unable to manage the daily business operations of such concern or, in the case of a publicly owned

business, not less than 51 percent of the stock of which is owned by one or more such veterans.

38 U.S.C. § 8128. Small business concerns owned and controlled by veterans: contracting priority

(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

(b) DEFINITION.—For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

48 C.F.R. Subpart 819.70. Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

819.7001 General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

819.7002 Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

819.7003 Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the requirements in FAR 19.102(f) to receive a benefit under this program.

819.7004 Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

819.7005 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the

contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

819.7006 Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

819.7007 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer.

A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7008 Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

819.7009 Contract clauses.

The contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219-11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart.

Supreme Court, U.S.
FILED
MAY - 1 2015
OFFICE OF THE CLERK

No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 38 U.S.C. 8127(d) requires that the Department of Veterans Affairs set aside all acquisitions for small business concerns owned and controlled by veterans—without regard to the contracting goals that the Secretary has established pursuant to 38 U.S.C. 8127(a)—when Congress has directed that the Section 8127(d) set-aside procedures apply "for purposes of meeting the goals under subsection (a)."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 12
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Adams & Assocs., Inc. v. *United States*, 109 Fed. Cl. 340 (2013) 4
Aldevra:
B-405271 et al., 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) 16
B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) 10, 16
Association of Am. R.R.s v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977) 19
Auer v. *Robbins*, 519 U.S. 452 (1997) 21
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 21
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 21
City of Joliet, Ill. v. *New W., L.P.*, 562 F.3d 830 (7th Cir. 2009), cert. denied, 559 U.S. 936 (2010) 19
District of Columbia v. *Heller*, 554 U.S. 570 (2008) 18, 19
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 13
Florentine v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239 (2d Cir. 1965) 19
Gade v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) 13

Cases—Continued: Page

Hawaii v. *Office of Hawaiian Affairs*, 556 U.S. 163 (2009) 19
Honeywell, Inc. v. *United States*, 870 F.2d 644 (Fed. Cir. 1989) 11
Jurgensen v. *Fairfax Cnty.*, 745 F.2d 868 (4th Cir. 1984) 19
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 21
Logan v. *United States*, 552 U.S. 23 (2007) 19
National Wildlife Fed'n v. *Marsh*, 721 F.2d 767 (11th Cir. 1983) 19
Parish Oil Co. v. *Dillon Cos.*, 523 F.3d 1244 (10th Cir. 2008) 19
Sharp Elecs. Corp. v. *McHugh*, 707 F.3d 1367 (Fed. Cir. 2013) 3
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 11, 21
Yazoo & Miss. Valley R.R. v. *Thomas*, 132 U.S. 174 (1889) 19

Statutes and regulations:

Small Business Act of 1953, Pub. L. No. 83-163, Tit. II, § 202, 67 Stat. 232 2
Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 (15 U.S.C 657f) 3, 5, 6
15 U.S.C. 657f(a)(1)-(3) 5
15 U.S.C. 657f(a)(1) 6
15 U.S.C. 657f(b) 5
Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 ..... *passim*
38 U.S.C. 8127(a)-(d) 6
38 U.S.C. 8127(a) 15

Statutes and regulations—Continued: Page

38 U.S.C. 8127(a)(1) 13, 19
38 U.S.C. 8127(a)(1)-(3) 13
38 U.S.C. 8127(a)(1)(A) 6
38 U.S.C. 8127(a)(1)(B) 6
38 U.S.C. 8127(a)(2) 6
38 U.S.C. 8127(a)(3) 6
38 U.S.C. 8127(b)-(c) 6, 16
38 U.S.C. 8127(b) ..... *passim*
38 U.S.C. 8127(c) ..... *passim*
38 U.S.C. 8127(d) ..... *passim*
38 U.S.C. 8127(f) 8
38 U.S.C. 8127(i) 8
38 U.S.C. 8127(*l*)(2) 6
38 U.S.C. 8128(a) 8
Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868 8
15 U.S.C. 631(a) 3, 4
15 U.S.C. 644(g)(1)(A) 4
15 U.S.C. 644(g)(1)(A)(ii) 4, 6
15 U.S.C. 644(g)(1)(B) 4, 6
15 U.S.C. 657a(b) 3
28 U.S.C. 1491(b)(1) 11
31 U.S.C. 3552(a) 10
41 U.S.C. 134 7
41 U.S.C. 152(3) 2
41 U.S.C. 1303(a)(1) 2
41 U.S.C. 3301(a)(1)-(2) 2
48 C.F.R.:
Pt. 2:
Section 2.101 7

Regulations—Continued: Page

Pt. 5:
Sections 5.101-5.102 2
Section 5.201(b) 16
Sections 5.201-5.207 2
Section 5.203 ..... 2, 16
Pt. 6:
Section 6.101(b) 2
Section 6.303-1 16
Section 6.303-2 16
Section 6.304 16
Pt. 8:
Section 8.002(a)(1)-(2) 4
Section 8.004 4
Section 8.402 2
Section 8.402(a) 3
Section 8.404(a) 3, 4
Section 8.404(d) 3
Section 8.405-1(b)-(c) 3, 16
Pt. 10:
10.002 4
Pt. 13 2
Pt. 14 2
Pt. 15 15
Pt. 19 4
Section 19.201(a) 3
Section 19.203(a) 7
Section 19.501(a) 4
Section 19.501(c) 4
Section 19.502-1(b) 4
Section 19.502-2(b)(1)-(2) 4

Regulations—Continued: Page

Pt. 38:
Section 38.000 3
Pt. 806:
Section 806.304 16
Pt. 808:
Section 808.405-2 10
Pt. 815:
Section 815.304 10
Section 815.304-70 10
Pt. 819:
Ch. 8 3
Subchap. D 22
Section 819.201 8
Section 819.7001 8
Section 819.7003 8
Section 819.7004 9
Section 819.7005(a) 9, 22
Section 819.7006(a) 9, 22
Section 819.7007(a)(2) 16
Section 819.7007(a)(3)-(4) 16
Section 819.7008(a)(2) 16
Section 819.7008(a)(3)-(4) 16
VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. (Dec. 8, 2009):
p. 64,619 8
p. 64,624 ..... 9, 11, 21
p. 64,629 8

Miscellaneous: Page

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p. 23,515 20

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H.R. 3082, 109th Cong., 2d Sess. (2006) 20

H.R. Rep. No. 592, 109th Cong., 2d Sess. (2006) 5, 20

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In the Supreme Court of the United States

No. 14-916

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (Pet. App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2014. A petition for rehearing was denied on September 10, 2014 (Pet. App. 73a-74a). On November 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 8, 2015. On December 29, 2014, the Chief Justice further extended the time to January 29, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The essence of the American economic system of private enterprise is free competition." Small Business Act of 1953, Pub. L. No. 83-163, Tit. II, § 202, 67 Stat. 232. Market competition is similarly essential to government contracting. Congress has directed the General Services Administration (GSA), the Department of Defense, and the National Aeronautics and Space Administration to issue "a single Government-wide procurement regulation," known as the Federal Acquisition Regulation (FAR). 41 U.S.C. 1303(a)(1). The FAR's overarching policy is to "obtain full and open competition" through the use of the "competitive procedures" that are "best suited under the circumstances of the procurement." 41 U.S.C. 3301(a)(1)-(2); see 48 C.F.R. 6.101(b).

Under the FAR, a traditional procurement from commercial sources involves publicly advertising requests for quotes, invitations for bids, or requests for proposals. See 48 C.F.R. Pts. 13, 14, 15. A contracting officer generally must prepare a solicitation, publicly advertise the opportunity, give vendors a reasonable time to respond, evaluate each offer, and ultimately award the contract. See *ibid.*; 48 C.F.R. 5.101-5.102, 5.201-5.207 (publication requirements).

For small-dollar contracts or repetitive supply requirements, however, the time and effort of such a solicitation would be wasteful and counterproductive. To provide agencies a "simplified process for obtaining commercial supplies and services at prices associated with volume buying," the GSA operates the Federal Supply Schedule (FSS) program, also known as the Multiple Awards Schedule program. 48 C.F.R. 8.402; see 41 U.S.C. 152(3). Contractors agree to

provide supplies and services "at stated prices for given periods of time." 48 C.F.R. 8.402(a). Suppliers publish a listing of the items offered, "as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). The GSA has determined that FSS orders are fully competitive and that prices are "fair and reasonable," so that "ordering activities are not required to make a separate determination of fair and reasonable pricing." 48 C.F.R. 8.404(a) and (d). A contracting officer in turn can simply go to the FSS website, check listings, and place an order. See 48 C.F.R. 8.405-1(b)-(c). The FSS thus permits federal agencies to immediately order items or services at competitive prices, without incurring the overhead costs or delays that publicly advertised solicitations entail. The FSS is "the premier acquisition vehicle in government," accounting for ten percent of overall procurement spending. GSA, *For Vendors–Getting on Schedule* (Jan. 7, 2015), http://www.gsa.gov/portal/content/198473.[1]

2. The United States has also long used government contracting to promote small businesses in general, and specifically small businesses from historically underutilized business zones, small businesses owned by women, and small businesses owned by veterans who have service-connected disabilities. See, *e.g.*, 15 U.S.C. 631(a), 657a(b), 657f; 48 C.F.R. 19.201(a). It is federal policy that small businesses

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[1] The GSA has delegated authority to the Department of Veterans Affairs (VA) to procure medical goods and services under a similar VA FSS program. 48 C.F.R. 38.000; see 48 C.F.R. Ch. 8. In this brief, the term "FSS" encompasses both the GSA FSS and the VA FSS.

should receive "a fair proportion of the total purchases and contracts * * * for the Government." 15 U.S.C. 631(a). Congress has directed the President to set government-wide goals (and each agency to set agency-wide goals) for procurement from small businesses, including in certain socioeconomic categories. 15 U.S.C. 644(g)(1)(A) and (B). The government-wide goal for procurement from service-disabled veteran-owned small businesses must be at least three percent. 15 U.S.C. 644(g)(1)(A)(ii).

Part 19 of the FAR includes procedures for limiting competition exclusively to small businesses when a contracting officer is procuring goods or services from commercial sources in the open market. See 48 C.F.R. 19.501(a) and (c). The principal set-aside mechanism is known as the "Rule of Two," which when applicable requires a contracting officer to set aside acquisitions for small business participation when there is a "reasonable expectation" that "[o]ffers will be obtained from at least two responsible small business concerns" and an "[a]ward will be made at fair market prices." 48 C.F.R. 19.502-2(b)(1)-(2). See *Adams & Assocs., Inc.* v. *United States*, 109 Fed. Cl. 340, 355 (2013); 48 C.F.R. 10.002 (establishing procedures for performing market research). If the contracting officer expects those events to occur, she will publicize a solicitation restricted to qualifying small businesses.

Part 19's small-business set-aside procedures "do not apply" to orders placed against FSS contracts. 48 C.F.R. 8.404(a), 19.502-1(b). And the FAR gives contracting officers discretion to decide whether to procure from the FSS rather than commercial sources in the open market. See 48 C.F.R. 8.002(a)(1)-(2), 8.004;

see Pet. App. 3a. A contracting officer thus can order from the FSS without performing market research to determine whether there is a "reasonable expectation" that setting aside the procurement for small businesses would lead to a fair market price, and without publicizing a solicitation if she has such an expectation.

3. In 2003, Congress strengthened efforts to support service-disabled veteran-owned small businesses. See Veterans Benefits Act of 2003 (2003 Act), Pub. L. No. 108-183, 117 Stat. 2651. First, Congress gave contracting officers discretion to set aside contracts of any size to service-disabled veteran-owned small businesses under the Rule of Two, *i.e.*, if the officer has a "reasonable expectation" that two or more such businesses will submit offers and that "the award can be made at a fair market price." 15 U.S.C. 657f(b). Second, Congress gave contracting officers discretion to award a sole-source contract of $5 million or less to such a business if the business is a "responsible contractor," the award "can be made at a fair and reasonable price," and the contracting officer does *not* have a reasonable expectation that the Rule of Two will be satisfied. 15 U.S.C. 657f(a)(1)-(3).

Despite those statutory changes, the government fell short of its goal that three percent of contracts be awarded to service-disabled veteran-owned small businesses. In 2005, for example, only 0.605% of contracting went to such businesses. See H.R. Rep. No. 592, 109th Cong., 2d Sess. 16 (2006) (House Report).

In 2006, Congress responded by enacting the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 Act), Pub. L. No. 109-461, 120 Stat. 3403, which included a targeted procurement program exclusively for the Department of Veterans

Affairs (VA). See 38 U.S.C. 8127. In contrast to other agencies, which have goals for contracting with small businesses owned by veterans who are service-disabled, see 15 U.S.C. 644(g)(1)(A)(ii) and (B), the 2006 Act requires the Secretary of the VA also to establish a separate goal for contracting with any small business owned by a veteran, including a veteran without a service-connected disability, see 38 U.S.C. 8127(a)(1)(A) and (2); see also 38 U.S.C. 8127(*l*)(2) (defining "small business concern owned and controlled by veterans"). And whereas other agencies may set goals for contracting with service-disabled veteran-owned small businesses that are higher or lower than the government-wide goal of three percent, see 15 U.S.C. 644(g)(1)(A)(ii) and (B), the 2006 Act requires the Secretary of the VA to set a goal that is at least as high as the government-wide goal, see 38 U.S.C. 8127(a)(1)(B) and (3).

The 2006 Act also provides the VA unique tools for achieving the Secretary's goals. First, in contrast to other agencies, which can use set-aside procedures to restrict competition to small businesses owned by veterans who have a service-connected disability, see 15 U.S.C. 657f, the 2006 Act also enables the VA to restrict competition to small businesses owned by veterans who do not have service-connected disabilities, see 38 U.S.C. 8127(a)-(d).

Second, in contrast to other agencies, which can enter into sole-source contracts only when the Rule of Two is not satisfied, see 15 U.S.C. 657f(a)(1), the 2006 Act empowers the VA to enter into sole-source contracts irrespective of whether that Rule is satisfied, see 38 U.S.C. 8127(b)-(c). Section 8127(b) provides that, "[f]or purposes of meeting the goals under sub-

section (a), and in accordance with this section," the VA may use non-competitive procedures to enter into a contract for an amount less than $150,000 with a veteran-owned small business concern. 38 U.S.C. 8127(b); 41 U.S.C. 134; 48 C.F.R. 2.101. And Section 8127(c) provides that, "[f]or purposes of meeting the goals under subsection (a), and in accordance with this section," the VA may enter into a sole-source contract anticipated to be between $150,000 and $5 million if the contracting officer determines that a veteran-owned small business concern is a "responsible source" and that "the contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(c).

Third, Section 8127(d) provides:

> USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more [such businesses] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. 8127(d).

Fourth, whereas the FAR generally provides "no order of precedence" for other agencies when considering socioeconomic set-asides, 48 C.F.R. 19.203(a), the 2006 Act made veteran-owned small businesses the first priority for the VA. "In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary

shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." 38 U.S.C. 8128(a). Congress also specified that service-disabled veteran-owned small business concerns get first priority, followed by other veteran-owned small business concerns, followed by other small business contracting preferences. 38 U.S.C. 8127(i). The Act does not address the FSS.

Since the 2006 Act went fully into effect, the Secretary has set goals of between 7% and 12%, and the VA has consistently exceeded them. Pet. App. 9a.[2]

4. The VA has promulgated regulations implementing the 2006 Act. See *VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses*, 74 Fed. Reg. 64,619, 64,629 (Dec. 8, 2009). The regulations address the Act's goal-setting provision, see 48 C.F.R. 819.201, the purpose of the program, 48 C.F.R. 819.7001, and requirements for eligibility to participate, 48 C.F.R. 819.7003. The regulations also establish priorities among veteran-owned small business

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[2] Petitioner questions the VA's success in meeting the Secretary's goals, pointing to an audit that ended in May 2010 that found the VA's reported figures to be overstated because of problems in verifying eligibility for set-asides when businesses used subcontractors. See Pet. 32; VA, Office of Inspector Gen., *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011), http://www.va.gov/oig/52/reports/2011/VAOIG-10-02436-234.pdf. Congress addressed that uncertainty in October 2010 by amending Section 8127(f) to impose additional subcontractor verification requirements. See Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868. Since that amendment, the VA has continued to exceed its goals. See Pet. App. 9a.

preferences and other forms of small-business preferences. 48 C.F.R. 819.7004.

The regulations implementing Section 8127(d) provide:

> The contracting officer shall consider [service-disabled veteran-owned small business] set-asides before considering [veteran-owned small business] set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that,
>
> > (1) Offers will be received from two or more eligible [service-disabled veteran-owned small business] concerns; and
> >
> > (2) Award will be made at a fair and reasonable price.

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for veteran-owned small businesses).

In the Federal Register notice publishing the final rule, the VA explained that it had rejected as unnecessary a proposed change that would have altered the regulation to state that it does not apply to FSS orders. 74 Fed. Reg. at 64,624. The VA stated that the regulation as written "does not apply to FSS task or delivery orders." *Ibid.* The "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Ibid.*

The VA encourages veteran-owned small businesses to participate in the FSS program. Press Release, *Statement on VA Veteran-Owned Small Bus-*

iness Contract (Oct. 28, 2011), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2191.[3] "[I]n 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to [veteran-owned small businesses]." Pet. App. 4a.

5. In February 2012, the VA decided to procure an Emergency Notification Service for several VA medical centers. Pet. App. 9a, 50a. The contracting officer used the FSS and awarded the contract to a supplier that was not a veteran-owned small business. *Id.* at 9a-10a. The contract was for $33,824.10 for one year, with options to extend the contract for two more years. *Id.* at 50a-51a. The maximum amount of the contract, including options, was thus $101,472.30.

Petitioner is a certified service-disabled veteran-owned small business. Pet. App. 10a. On March 14, 2012, petitioner filed a bid protest with the Government Accountability Office (GAO). *Ibid.*; see 31 U.S.C. 3552(a) (GAO may hear bid protests). Petitioner alleged that the VA had violated Section 8127(d) by using the FSS without first conducting market research to determine whether two or more veteran-owned small businesses could fulfill the contract at a fair and reasonable price. Pet. App. 10a. Relying on its prior opinion in *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), the GAO

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[3] The VA also encourages FSS procurement from veteran-owned small businesses. For example, when a contracting officer uses the FSS and there are evaluation criteria in addition to price, the contracting officer must also include evaluation factors that provide additional consideration to veteran-owned small businesses (and businesses of any size that propose to subcontract with veteran-owned small businesses). See 48 C.F.R. 808.405-2, 815.304, 815.304-70.

sustained the protest and concluded that Section 8127(d) required the VA to follow Rule of Two procedures. Pet. App. 10a. As it had done in *Aldevra*, the VA advised petitioner that it would not follow the GAO's non-binding recommendation. *Ibid.*; see *Honeywell, Inc.* v. *United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989).

Petitioner filed a bid protest complaint in the United States Court of Federal Claims (CFC), which granted summary judgment to the government. Pet. App. 33a-71a; see 28 U.S.C. 1491(b)(1) (CFC jurisdiction). The CFC found that Section 8127(d) was ambiguous as to whether the VA could continue to use the FSS without first attempting a preferential set-aside pursuant to the Rule of Two. Pet. App. 56a-66a. To resolve the ambiguity, the court deferred to the VA's formal statement in the preamble to the regulations that it could continue to use the FSS without first attempting a Rule of Two set aside. *Id.* at 66a-71a (citing 74 Fed. Reg. at 64,624 and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

6. The court of appeals affirmed. Pet. App. 1a-21a. Unlike the CFC, the court of appeals held that the statute unambiguously foreclosed petitioner's interpretation. The court explained that "[t]he statutory scheme as a whole links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." *Id.* at 20a. The court concluded that "[t]he mandate is, therefore, the required procedure for meeting these goals," *ibid.*, and that the VA "need not perform a * * * Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met," *ibid.*

The court of appeals also found that requiring the VA to follow the Rule of Two procedure in all cases, without regard to whether the Secretary's goals had been achieved, would "read[] the words 'for purposes of meeting the goals under subsection (a)' out of the statute" and would "make[] the mandatory goal-setting statutory provision [in subsection (a)] unnecessary." Pet. App. 20a. The court explained that "[t]he correct reading of the statute according to its plain meaning puts the 'shall' in subsection (d) in harmonious context with the discretionary 'may' provisions of subsections (b) and (c)," and "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.*

Judge Reyna dissented. He concluded that the 2006 Act unambiguously requires the VA to apply Rule of Two procedures in every case, including FSS procurements, without regard to the Secretary's goals. Pet. App. 22a-32a.

ARGUMENT

The Federal Circuit correctly resolved the question presented here. Under petitioner's interpretation of the governing statute, the VA could not purchase a griddle or food slicer through the FSS without first performing market research to determine whether competition could appropriately be restricted to veteran-owned small business concerns. The court of appeals correctly rejected that inefficient and wasteful approach. Section 8127's text, structure, context, and history confirm that the provision establishes mandatory procedures for the VA to use "for purposes of meeting the [Secretary's] goals" for veteran-owned small businesses. 38 U.S.C. 8127(d).

Congress did not require the VA to use those procedures without regard to the Secretary's goals. Further review is not warranted.

1. a. The court of appeals correctly held that Section 8127 establishes mandatory procedures for the VA to use when restricting competition *for purposes of meeting the Secretary's goals*. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Courts must not be guided by a single word, sentence, or member of a sentence, but must "look to the provisions of the whole law." *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (citation omitted).

Section 8127(a)(1) provides that, "[i]n order to increase contracting opportunities for small business concerns owned and controlled by veterans" and service-disabled veterans, the Secretary "shall * * * establish" contracting goals for veteran-owned small business concerns generally, and for service-disabled veteran-owned small business concerns in particular. 38 U.S.C. 8127(a)(1)-(3). A "goal" is "the end toward which effort or ambition is directed: aim, purpose." *Webster's Third New International Dictionary* 972 (1993). By defining those contracting objectives as "goals" and placing the goal-setting requirements first, Congress indicated that the "end toward which effort or ambition is directed" is for the VA to contract with small businesses owned by veterans (and service-disabled veterans) at or above the percentage rates the Secretary seeks to achieve.

Section 8127's next three subsections provide tools for VA contracting officers to meet the Secretary's goals. Subsections (b) and (c) both provide that, "[f]or purposes of meeting the goals under subsection (a), and in accordance with this section," the VA "may" use non-competitive procedures to enter into contracts for amounts below certain dollar thresholds. 38 U.S.C. 8127(b) and (c). Subsection (d) uses the same structure, with two modifications. While Subsections (b) and (c) apply only to contracts below certain dollar amounts, Subsection (d) applies to contracts of any amount, "[e]xcept" as provided in Subsections (b) and (c). 38 U.S.C. 8127(d). And while Subsections (b) and (c) are optional ("may use" and "may award"), Subsection (d) is mandatory ("shall award"). *Ibid.* As the court of appeals correctly held (Pet. App. 20a), Section 8127(d) thus establishes the "mandatory * * * procedure" the VA must follow whenever it is contracting "for purposes of meeting the [Secretary's] goals," unless the contract falls below certain dollar thresholds, in which case the VA also has discretion to enter into a non-competitive contract pursuant to Subsection (b) or (c). The effect of the statutory directive that the Secretary must set goals, coupled with its mandate that preferential set-asides be followed "for purposes of meeting the [Secretary's] goals," is to make achievement of the Secretary's goals mandatory. See *id.* at 20a-21a (Section 8127 "changed what had been a 'may' to a 'shall' in terms of goals.").

b. By contrast, reading Section 8127 to establish mandatory procedures that the VA must follow whenever it attempts to purchase anything, regardless of the Secretary's goals, would render much of the statute meaningless and its structure bizarre. First, as

the court of appeals recognized, this reading would render the "goals" clauses in Subsections (b), (c), and (d) meaningless, since it would require the VA to give the same preferences for veteran-owned small businesses whether or not those goals have been achieved. Pet. App. 19a-20a. Second, and for essentially the same reason, Section 8127(a)'s "goal-setting provision is itself made superfluous" under petitioner's reading of the statute. *Id.* at 20a. It would be particularly odd for Congress to make setting and meeting "goals" the statute's centerpiece—and to reiterate in three consecutive subsections that the VA use certain set-aside procedures "for purposes of meeting the [Secretary's] goals"—if the VA must always attempt a preferential set-aside even after those goals have been met or exceeded.

Petitioner argues (Pet. 27) that the Secretary's goals provide "backstop[s]" and would encourage the VA to use the non-competitive procedures in Subsections (b) or (c) if the Rule of Two "falls short." But people ordinarily describe "backstops" as "backstops" rather than as "goals." This reading also does not explain Congress's choice to include the same "goals" clause in Subsection (d), which petitioner argues must be followed every time Subsections (b) and (c) are inapplicable, including for all contracts of more than $5 million. See 38 U.S.C. 8127(b), (c), and (d). If Congress had mandated that the VA follow Subsection (d) in every such case, there would be no need for further encouragement.

c. Petitioner's interpretation of Section 8127 would also produce significant waste and inefficiency. For example, the VA has already faced bid protests based on petitioner's interpretation of Section 8127 when the

VA used the FSS to buy "two griddles and one food slicer," see *Aldevra*, B-405271 et al., 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) (*Aldevra I*), and to purchase one "ice maker/dispenser," see *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) (*Aldevra II*). See also Pet. 16-19, 31 (citing *Aldevra I* and *Aldevra II*). Today, a contracting officer can simply open the FSS website, check the listings, and place an order for such an item. See 48 C.F.R. 8.405-1(b)-(c). But on petitioner's view, a contracting officer could not utilize the FSS without first performing market research to assess whether two or more veteran-owned small businesses can provide a griddle at a fair and reasonable price. This would be markedly less efficient than the FSS and could also create harmful delay.

For contracts of less than $5 million, contracting officers may also use non-competitive procedures to enter into sole-source contracts. See 38 U.S.C. 8127(b)-(c). But entering into contracts without competition raises unique risks, and contracting officers accordingly must follow certain procedures before doing so. A contracting officer must "synopsize" the opportunity, which generally requires publicizing it in advance. See 48 C.F.R. 819.7007(a)(2), 819.7008(a)(2); see also 48 C.F.R. 5.201(b), 5.203. She must make a determination that the recipient is "a responsible contractor with respect to performance" and that the "award can be made at a fair and reasonable price." See 48 C.F.R. 819.7007(a)(3)-(4), 819.7008(a)(3)-(4). And she must justify (and, depending on the amount, obtain approval of) the choice to enter into a contract without competition. See 48 C.F.R. 6.303-1, 6.303-2, 6.304, 806.304. Subsections (b) and (c) thus are no

substitute for the FSS and do not remedy the efficiency problems that petitioner's approach would entail.

2. a. Petitioner argues (Pet. 23-25) that the court of appeals' interpretation makes "shall award" in Subsection (d) permissive, and thus eliminates the distinction between "shall" in Subsection (d) and "may" in Subsections (b) and (c). But the court of appeals recognized that the word "shall" is mandatory, and it distinguished that command from the discretionary language of Subsections (b) and (c). The court stated that Subsection (d) imposes a "mandate (denoted by the word 'shall')," and that the Rule of Two procedure is "the required procedure for meeting" the Secretary's goals. Pet. App. 20a. It further explained that Subsections (b) and (c) are "discretionary" even when the VA is acting "for purposes of meeting the [Secretary's] goals" and the contract is small enough that these procedures can be used. *Ibid.* The court's reading of Subsection (d) "according to its plain meaning" thus puts that provision in "harmonious context with the discretionary 'may' provisions of subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.*

b. Petitioner and its amici also argue that, by construing Section 8127(d)'s Rule of Two mandate to apply only "for purposes of meeting the [Secretary's] goals," the court of appeals "violate[d] the axiom that prefatory clauses do not constrain or enlarge operative clauses." See Pet. 25-28; Am. Legion Amicus Br. 17-18. That characterization begs the question of *whether* the "goals" clause is prefatory or operative. A clause is prefatory "where the text of a clause itself

indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 n.3 (2008); see 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 20:3, at 122 (7th ed. 2009) (*Sutherland*) ("The preamble to a statute is a prefatory explanation or statement, often commencing with the word 'whereas,' which purports to state the reason or occasion for making a law or to explain in general terms the policy of the enactment.").

Here, the "goals" clause is operative. The "goals" clauses in Subsections (b), (c), and (d) do not contain the telltale "whereas" language. They are not part of a statement of congressional findings or purpose. And they are not part of a prologue or preamble, as Subsections (b), (c), and (d) do not appear at the start of the statute. See *Black's Law Dictionary* 1365 (10th ed. 2014) (defining "preamble" as "[a]n introductory statement * * * explaining [a] document's basis and objective"); *Sutherland* § 20:3, at 125 ("The preamble customarily precedes the enacting clause in the text of a bill, and consequently is frequently understood not to be part of the law.").

Indeed, the "goals" clause in Subsection (d) does not even appear at the start of that fourth subsection. Rather, it appears between an operative clause that limits the scope of the Rule of Two mandate ("[e]xcept as provided in subsections (b) and (c)") and another operative clause that further limits the scope of the mandate ("in accordance with this section"). 38 U.S.C. 8127(d). The natural inference is that the "goals" clause also imposes operative limits on the scope of the mandate, just like the two clauses it is sandwiched

between. Cf. *Logan* v. *United States*, 552 U.S. 23, 31 (2007) ("Words in a list are generally known by the company they keep.").

To the extent Section 8127 contains any prefatory clause, it can be found in its usual place: At the beginning of the statute. In Subsection (a)(1), Congress stated, "In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall" establish certain goals. 38 U.S.C. 8127(a)(1). It would be strange for Congress, after including a statement of purpose at the beginning of a statute, to repeat itself without any operative effect in each of the next three subsections—and stranger still when those three subsections are otherwise entirely operative. Petitioner and its amici identify no judicial decision finding a clause to be prefatory under similar circumstances. See *Heller*, 554 U.S. at 578 n.3 (introductory clause of constitutional amendment); *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 168 (2009) ("whereas" clauses in preamble); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174 (1889) (same); *Jurgensen* v. *Fairfax Cnty.*, 745 F.2d 868, 885 (4th Cir. 1984) (preamble); *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249-1251 (10th Cir. 2008) (introductory clause of statute); *City of Joliet, Ill.* v. *New W., L.P.*, 562 F.3d 830, 837 (7th Cir. 2009) (statement of findings and purpose), cert. denied, 559 U.S. 936 (2010); *Association of Am. R.R.s* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (same); *National Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983) (same); *Florentine* v. *Church of Our Lady of Mt.*

Carmel, 340 F.2d 239, 241-242 & n.3 (2d Cir. 1965) (same).

c. The legislative history further undercuts petitioner's contention that Section 8127 imposes mandatory procedures that apply to all VA procurement efforts. The 2006 Act reflects a compromise between the House and Senate Committees on Veterans' Affairs, which issued a Joint Explanatory Statement setting forth their shared intent. See 152 Cong. Rec. 23,510 (2006). The Committees explained that "[c]ontracting officers would *retain the option* to restrict competition to small businesses owned and controlled by veterans if the contracting officer has an expectation that two or more such businesses * * * will submit offers for the contract including all contracts exceeding $5,000,000." *Id.* at 23,515 (emphasis added); see H.R. 3082, 109th Cong., 2d Sess., § 101 (2006). "The Committees anticipate[d] that acquisition officials will *exercise reasonable judgment* when attempting to meet the several set-aside goals including giving 'preference' to veteran or service-disabled veteran-owned businesses." 152 Cong. Rec. at 23,515 (emphasis added). Those statements are incompatible with petitioner's view that the VA must always first follow Section 8127's procedures for restricting competition and thus can never simply utilize the FSS, no matter how reasonable that would be.[4]

3. While the Federal Circuit viewed the VA's interpretation of Section 8127 as unambiguously cor-

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[4] Petitioner also relies (Pet. 14, 29) on a statement that veteran-owned small businesses "should routinely be granted the primary opportunity to enter into VA procurement contracts." House Report 14-15. But petitioner's position is that veteran-owned small businesses should *always* be granted the "primary opportunity."

rect, the CFC found that the statute neither requires nor precludes the VA's approach. Under either view of the matter, the judgment below is correct and does not warrant further review because the VA determined, after notice-and-comment rulemaking, that the agency may continue to use the FSS without regard to the Rule of Two. See 74 Fed. Reg. at 64,624 (the Rule of Two mandate "does not apply to FSS task or delivery orders"); *ibid.* ("VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to * * * FSS acquisitions."). That conclusion warrants deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984), as an interpretation of Section 8127, or under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), as an interpretation of the VA's own regulations. And, as the CFC concluded, the VA's position would also warrant deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See Pet. App. 69a.[5]

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[5] The American Legion argues that the court of appeals failed to apply the longstanding canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." Am. Legion Amicus Br. 2 (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). But Section 8127 is not a benefits statute; it is a government-contracting statute. Neither petitioner here nor any of the judges below relied upon the canon of interpretation that the American Legion invokes, and we are aware of no precedent extending the canon into the context of government contracting. In any event, that canon would not alter the result here because the court of appeals held that Section 8127(d) unambiguously foreclosed petitioner's position, and the

Petitioner argues (Pet. 15, 30-31) that, under the VA regulations implementing Section 8127, the agency's duty to follow the Rule of Two procedure is not limited by Section 8127(d)'s "goals" clause. That argument reflects a misunderstanding of the regulatory scheme. The VA's regulations implementing Section 8127 are codified in the subchapter of the VA's FAR regulations that is devoted to "socioeconomic programs." See 48 C.F.R. Ch. 8, Subchap. D. Nothing in that subchapter provides that socioeconomic set-asides must be attempted in all cases. Nor do those regulations depart from the longstanding principles that contracting officers have discretion to use the FSS rather than procure from commercial sources in the open market, and that FSS procurements are exempt from set-aside requirements. See pp. 4-5, *supra*.

The regulations implementing Section 8127(d) provide:

> The contracting officer shall consider [service-disabled veteran-owned small business] set-asides before considering [veteran-owned small business] set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation [that the Rule of Two will be satisfied].

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for veteran-owned small businesses). The first sentence's direction that contracting officers "shall consider [service-disabled veteran-owned small business]

VA's interpretation of Section 8127(d) and its own regulations would warrant deference.

set-asides before considering [veteran-owned small business] set-asides" indicates that, like the "shall award" command in Section 8127(d), the "shall set-aside" command in the VA's regulations applies in the context of open-market acquisitions when the VA is "considering * * * set-asides." *Ibid.* Accordingly, the "shall set-aside" requirement does not apply when the VA is ordering from the FSS and is not considering set-asides. When quoting these regulations, however, petitioner omits the first sentence, see Pet. 15, which changes the regulations' tenor.

4. Petitioner argues (Pet. 34-36) that this case is important because, under petitioner's reading, Section 8127 would require the VA to use preferential set-asides in billions of dollars of additional procurement efforts. But that simply describes the dramatic impact of petitioner's merits position that Section 8127 establishes mandatory procedures governing *all* VA procurement efforts, rather than all procurements "for purposes of meeting the [Secretary's] goals," as Congress provided in Subsections (b), (c), and (d). The fact that petitioner's interpretation would dramatically change law and practice, such as by preventing the VA from using the FSS to order a griddle as expeditiously as possible, indicates not that further review is warranted, but that the court of appeals' judgment is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE GOVERNMENT'S DEFENSE OF THE DECISION BELOW CONFIRMS THAT REVIEW IS WARRANTED 2

A. Prefatory/Operative Distinction 2

B. Annual Goals And Mandatory Procedures 5

C. Legislative History 6

D. Agency Regulations 7

II. CONTRARY POLICY VIEWS PROVIDE NO GROUNDS FOR DISREGARDING THE STATUTORY TEXT 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Conroy v. *Aniskoff*, 507 U.S. 511 (1993) 11

District of Columbia v. *Heller*, 554 U.S. 570 (2008) 3

Mansell v. *Mansell*, 490 U.S. 581 (1989) 7

Parish Oil Co. v. *Dillon Cos.*, 523 F.3d 1244 (10th Cir. 2008) 3

SEC v. *Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013) 4

TVA v. *Hill*, 437 U.S. 153 (1978) 8

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

38 U.S.C.
- § 8127(a) 5
- § 8127(b) 5, 6, 7
- § 8127(c) 5, 6, 7
- § 8127(e) 11
- § 8127(f) 11
- § 8127(d) ..... *passim*

48 C.F.R.
- § 810.001 11
- § 819.7005(a) 7
- § 819.7006(a) 7

VA Acquisition Regulation, 74 Fed. Reg. 64,619 (Dec. 8, 2009) 8

152 Cong. Rec. 23,509 (2006) 7

H.R. Rep. No. 109-592 (2006) 6, 11

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Frye, Jan R., VA Deputy Ass't Sec'y for Acquisitions & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* (May 14, 2015), *available at* http://veterans.house.gov/sites/republicans.veterans.house.gov/files/Fry.pdf 9

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Rein, Lisa, & Emily Wax-Thibodeaux, *Official: VA Improperly Spent $6 Billion on Care*, Wash. Post, May 14, 2015, at A3 9

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The government does not dispute that this case presents a pure question of statutory construction. It does not and cannot identify any vehicle problem that would preclude reaching that question. Nor does it dispute that the question is exceptionally important: The Federal Circuit's interpretation governs the procedures used to award billions of dollars in contracts and profoundly affects the opportunities available to veteran-owned and service-disabled veteran-owned small businesses. In short, this case squarely presents a pure question of law on an issue of national importance, and the government does not even attempt to argue that many of the traditional criteria for denying review apply.

The government instead devotes its opposition to defending the merits of the decision below. But arguing that the Court should deny review on the merits by prejudging those same merits puts the cart before the horse and ignores the substantial criticism of the government's shifting position throughout this case. The Government Accountability Office rejected the government's interpretation in numerous bid protest decisions, only to have the Department of Veterans Affairs take the highly unusual step of disregarding the GAO's guidance. And Judge Reyna's dissent in the Federal Circuit thoroughly and persuasively criticizes the majority opinion's analysis that the government now defends.

Indeed, far from supporting the government, the underlying merits strongly favor reversing the Federal Circuit's decision. The text, context, purpose, and history of the 2006 Veterans Act all confirm that Congress learned from the failure of prior discretionary measures to improve contracting opportunities for veteran-owned small businesses and chose to enact a mandatory

"Rule of Two" specific to the VA—the agency primarily responsible for reintegrating America's veterans into the economic fabric of the country after their military service.

The government's dismissive view of the alleged "waste and inefficiency" (Opp. 15) of the statute as drafted also reinforces the need for review. The statute says that the VA "shall award" contracts on the basis of competition restricted to small businesses owned by veterans when the requirements of the Rule of Two are satisfied. 38 U.S.C. § 8127(d). It is not for an agency of the Executive Branch to disregard that clear command based on its own reweighing of the policies Congress adopted. If permitted to stand, the Federal Circuit's decision will deprive large numbers of veteran-owned and service-disabled veteran-owned small businesses of contracting opportunities Congress intended to provide for them. American Legion Br. 18-20; NVSBC Br. 4, 11. The petition should be granted, and that decision should be reversed.

I. THE GOVERNMENT'S DEFENSE OF THE DECISION BELOW CONFIRMS THAT REVIEW IS WARRANTED

The government's defense of the decision below falls far short of showing that the Federal Circuit's divided and heavily criticized ruling on the exceptionally important question of statutory interpretation presented here should be allowed to stand without further review. Indeed, the government's adoption of the Federal Circuit's errors drives home the importance of granting the petition.

A. Prefatory/Operative Distinction

1. The government places dispositive weight on the "for purposes of meeting the goals" clause in

§ 8127(d). Opp. 13-14. However, that prefatory language does not limit the operative force of the Rule of Two mandate. Pet. 25-26; American Legion Br. 14-18.

The government contends that the "for purposes of meeting the goals" clause would be "meaningless" if the VA were required to apply the Rule of Two "even after th[e] goals have been met or exceeded." Opp. 15. But the government misunderstands the role of such a prefatory clause, which is to state a purpose but not delimit the bounds of the statute. For example, "if a statute provides that dogs are to be muzzled *for the purpose of* stamping out rabies they must continue to be muzzled so long as the statute is in force, even though rabies has been stamped out." Hibbert, *Jurisprudence* 95 (1932) (emphasis added); *see* Scalia & Garner, *Reading Law* 220 (2012).

In *District of Columbia* v. *Heller*, this Court explained that a prefatory clause is one that "announces a purpose." 554 U.S. 570, 577 (2008). That is precisely what the clause here does: "[F]or *purposes* of meeting the goals" the Secretary sets, VA contracting officers "shall" apply the Rule of Two. This general expression of a desired outcome does not trump the unequivocal command in § 8127(d)'s operative clause.

The government argues that the placement of the "for purposes of" clause in § 8127(d), rather than in a formal preamble beginning with "whereas," shows that it must be operative. Opp. 18-19. Case law and common sense are squarely to the contrary. Congress may announce its purposes wherever and however often it wishes in a statute, and need not do so only in a separate and self-contained preamble. *See, e.g.*, *Heller*, 554 U.S. at 578 & n.3 (introductory clause of amendment distinct from preamble to Constitution); *Parish Oil Co.*

v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008) (introductory clause of § 113 of Colorado's Unfair Practices Act, which also has a separate purpose section); *SEC* v. *Straub*, 921 F. Supp. 2d 244, 260-261 (S.D.N.Y. 2013) (non-operative "statement of purpose" at the end of statutory provision); *see also Reading Law* 220 ("Expressions of purpose are usually placed [in a preface], but they do not have to be."). The government cannot offer a single example in which similar language has been given operative effect to override a mandatory command.

2. The government's interpretation is further undermined by its failure to articulate clearly and consistently how it thinks the "for purposes of meeting the goals" clause should be given operative effect. At points, the government implies that its only objection is to applying the Rule of Two "after" the annual goals are met. Opp. 15. But the VA does not treat the Rule of Two as mandatory for all acquisitions *until* the annual goals are met. Instead, it interprets the statute as mandating use of the Rule of Two only "if the contracting officer determines *in his or her discretion* that a specific procurement should be set aside" to help meet the annual goals. Resp. C.A. Br. 16 (emphasis added); *see* Opp. 21. That reading "guts the Rule of Two imperative." Pet. App. 22a (Reyna, J., dissenting). For a given acquisition, the statute would operate the same way if the mandatory "shall award" language in § 8127(d) were replaced with "may award."

The government nevertheless takes pains to disclaim any reading of § 8127(d) as merely "permissive." Opp. 17 ("the word 'shall' is mandatory," not "discretionary"); *see id.* 12, 13, 14 ("mandatory"). It does so for good reason: Reading "shall" in § 8127(d) as mandatory is the only defensible construction of the statutory text,

especially in contrast to "may" in § 8127(b) and (c). Pet. 23-25. The government's effort to achieve the same permissive outcome, even while feigning to regard the statute as mandatory, is telling.

At bottom, the Federal Circuit held that § 8127(d) imposes no constraints at all on the VA's choice of procurement methods "as long as the goals set under subsection (a) are met." Pet. App. 20a. The effect, in the government's view, "is to make achievement of the Secretary's goals mandatory" but not to mandate use of the Rule of Two to meet or exceed the goals. Opp. 14. Had Congress intended that result, it could have said that the Rule of Two is mandatory "if the goals are not met," or that the agency "shall" meet annual goals and "may" use the Rule of Two to do so. It did not.

B. Annual Goals And Mandatory Procedures

The government also embraces the Federal Circuit's view that § 8127(a)'s "'goal-setting provision is itself made superfluous' under petitioner's reading." Opp. 15. But service-disabled and other veteran-owned small businesses must clear certain hurdles to be eligible for consideration (Pet. 14), and § 8127(d) requires that competition be limited to such businesses only when there is a "reasonable expectation" of two or more eligible bids "and that the award can be made at a fair and reasonable price that offers best value to the United States." The statute does not guarantee that any number of contracts will be awarded to veteran-owned small businesses or that any annual goals will be met.

Mandating both goal-setting and application of the Rule of Two was sensible, not "bizarre" (Opp. 14). Transparent public goals allow the agency and Con-

gress to measure progress and to impose accountability when the agency falls short. A shortfall might, for example, signal that § 8127(d) is not being implemented properly or that the VA needs to do additional training or outreach to eligible businesses. The goals can also help guide the VA's discretionary authority to award contracts to veteran-owned small businesses under § 8127(b) and (c). Pet. 27-28, 32-33.

More broadly, the government never explains *why* Congress would not have wanted the VA to continue to use the Rule of Two after its annual goals are met. Annual contracting goals are "aspirations, not destinations," and exceeding them is laudable. Pet. App. 30a (Reyna, J., dissenting). Indeed, the government itself recognizes that Congress's objective was "for the VA to contract with small businesses owned by veterans (and service-disabled veterans) at *or above* the percentage rates the Secretary seeks to achieve." Opp. 13 (emphasis added). The Federal Circuit's decision encourages the VA to treat its goals as a ceiling.

C. Legislative History

The government contends that its reading is supported by the legislative history (Opp. 20), but the opposite is true. The 2006 Veterans Act was adopted after years of frustration with the failure of federal officials to use the discretionary tools *already* available to them to satisfy government-wide contracting goals for veteran-owned small businesses. Pet. 11-14, 28-30; American Legion Br. 21-22. In response, Congress intended to require that veteran-owned small businesses "routinely be granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15 (2006).

The government's contrary view misreads a joint statement issued by the House and Senate Committees on Veterans' Affairs. The Committees explained that in some circumstances VA contracting officers "would be allowed to award non-competitive contracts" to veteran-owned small businesses under § 8127(b) and would be "allowed, but not required, to award sole source contracts" to such businesses under § 8127(c). 152 Cong. Rec. 23,509, 23,515 (2006). The Committees then explained, in the sentence cherry-picked by the government, that "[c]ontracting officers would retain the option to restrict competition" using the Rule of Two under § 8127(d). *Id.* That is not a general description of the Rule of Two as merely an "option," but rather a recognition that the Rule of Two may be used even when circumstances permit use of the discretionary ("may use" and "may award") sole-source or non-competitive provisions in the statute.

The joint statement thus does not support the government's interpretation, and it certainly does not detract from the other evidence showing that Congress intended to mandate use of the Rule of Two. At a minimum, in the face of "plain and precise statutory language," the government fails to identify any "clear evidence that reading the language literally would thwart the obvious purposes of the Act." *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989).

D. Agency Regulations

The government's argument for deference is equally unpersuasive. Opp. 20-23. The implementing regulations, 48 C.F.R. §§ 819.7005(a) and 819.7006(a), repeat the mandatory language of § 8127(d) and *omit* the very phrase—"for purposes of meeting the goals"—that the government now claims to be the "centerpiece" of the

statute (Opp. 15). The plain language of the regulations therefore requires application of the Rule of Two in this case. The additional sentence that the government quotes (Opp. 22) merely favors service-disabled veterans over other veterans and does not "change[] the regulations' tenor" (*id.* 23).

Perhaps recognizing this difficulty, the government focuses on a statement in the rulemaking preamble broadly asserting that "set-asides do not apply to [Federal Supply Schedule] orders." *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). But the preamble is not law, was not subject to notice-and-comment procedures, and would not be entitled to deference, even if the statute were ambiguous. Pet. 31. Moreover, the VA abandoned the actual reasoning of the preamble—which cited inapplicable provisions of the Federal Acquisition Regulation—after the GAO conclusively debunked it. *Id.* 17.

The Federal Circuit's strained effort to resolve the case in the government's favor at *Chevron* step one appears to have been driven by concern that acknowledging *any* ambiguity in the statute would necessitate a victory for petitioner under the VA's own regulations. This dependence on the incredible assertion that § 8127(d) *unambiguously* requires the interpretation adopted below provides yet another reason for review.

II. Contrary Policy Views Provide No Grounds For Disregarding The Statutory Text

It is a bedrock principle, grounded in the constitutional separation of powers, that any "appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U.S.

153, 194 (1978). The Federal Circuit's results-driven approach to § 8127(d) violated that principle. Pet. App. 22a (Reyna, J., dissenting).

The government echoes the same policy disagreement, decrying the supposed "waste and inefficiency" (Opp. 15) of applying the statute as written. None of the government's policy concerns provides any reason to second-guess the plain text of the statute.

First, the government makes only a half-hearted attempt to defend the panel's reliance on unverified contracting statistics—requested at oral argument—purporting to show that the VA has met its contracting goals under its interpretation of § 8127(d). The figures the government provided were admittedly inaccurate as to at least 2010 and likely other years. Pet. 21 n.4. The government's claim (Opp. 8 n.2) that the inaccuracies were caused solely by subcontracting verification problems that were later fixed is belied by the audit itself. *See* VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 12 (July 25, 2011) (faulting "ineffective oversight," "lack of coordination," and "purposeful[]" misconduct).

Moreover, the senior procurement official for the VA recently testified before Congress that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisitions & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015); *see also* Rein & Wax-Thibodeaux, *Official: VA Improperly Spent $6 Billion on Care*, Wash. Post, May 14, 2015, at

A3 (describing Frye's account of a "culture of 'lawlessness and chaos'" and orders placed from supply contracts "for higher prices ... 'indiscriminately and not in accordance' with acquisition laws").

Second, the government's discussion of efficiency entirely ignores the administrative difficulties created by the decision below. Construing the Rule of Two as mandatory only if the goals are *not* met leaves the operation of the statute at best unclear and at worst unworkable. Pet. 28; NVSBC Br. 15-18. A mandate that switches on and off would work "real mischief" by "saddl[ing] contracting officers" with the administrative burden of "determin[ing] the status of the agency's small business goals" before every acquisition. Pet. App. 32a (Reyna, J., dissenting). Applying the text of the law as written would be far less disruptive to day-to-day contracting activity.

Third, the government exaggerates the cost of complying with the Rule of Two and disregards the substantial safeguards built into the law. By the terms of the statute, no award can be made under the Rule of Two unless there is a reasonable expectation that "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The government will not be overpaying for "a griddle or food slicer." Opp. 12.

That leaves only the argument that contracting officers should not be put to the supposed inconvenience of considering whether small businesses owned by the nation's veterans can provide goods and services on acceptable terms. Opp. 2-3, 15-17, 23. However, determining whether the requirements of § 8127(d) are satisfied need not be onerous. Pet. App. 30a-31a (Reyna, J., dissenting). The 2006 Veterans Act requires the VA to

maintain a database of veteran-owned small businesses, so contracting officers already have a ready list of eligible suppliers. Pet. 14-15, 35; *see* 38 U.S.C. § 8127(e)-(f).[1] Having required those businesses to submit to elaborate and costly verification procedures, the government can hardly now complain that consulting its own database would be inefficient.

Fourth, and most importantly, the policy decision to impose a mandatory Rule of Two for all VA acquisitions and the attendant weighing of costs and benefits has already been done by Congress. For years, Congress heard from the veteran community about the "culture of indifference" among federal contracting officers. H.R. Rep. No. 109-592, at 15. Congress enacted § 8217(d) to remedy that problem and to ensure that contracting officers at the VA "shall" consider veteran-owned small businesses even when VA officials would prefer not to as a matter of bureaucratic convenience.

Criticizing § 8217(d) as inefficient is not only wrong but beside the point. The statute serves other interests Congress chose to prioritize here, as it has elsewhere. *E.g.*, *Conroy* v. *Aniskoff*, 507 U.S. 511, 517 (1993) ("deliberate policy judgment" in favor of service-members at the cost of "occasionally burdening the tax collection process"). The 2006 Act is an expression of the profound debt the country owes to those who served in the military and to their families. It is also an affirmation of Congress's faith in the capacity of America's veterans to provide many of the goods and services needed by the VA. The decision below guts that congressional policy choice and should be reversed.

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[1] Consulting the database is already supposed to be a mandatory part of pre-acquisition market research. 48 C.F.R. § 810.001.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. SECTION 8127(d) REQUIRES THE VA TO CONSIDER THE RULE OF TWO BEFORE USING THE FSS PROGRAM 3

A. The Government's Textual Distinction Between "Contracts" And "Orders" Fails 3

B. The Government's Analogy To The Small Business Act Also Fails 11

C. The Veterans Canon Resolves Any Alleged Ambiguity 16

II. THE GOVERNMENT'S POSITION IS CONTRADICTED BY VA REGULATIONS AND IS NOT OWED DEFERENCE 17

III. THE GOVERNMENT'S POLICY DISAGREEMENT WITH CONGRESS DOES NOT JUSTIFY AN FSS LOOPHOLE 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page(s)

AmerescoSolutions, Inc., ASBCA Nos. 56824 & 56867, 11-1 BCA ¶ 34,705 (2011) 5

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 19

Contract Management, Inc. v. *Rumsfeld*, 434 F.3d 1145 (9th Cir. 2006) 14

DGR Associates, Inc. v. *United States*, 94 Fed. Cl. 189 (2010) 14

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 17

LB&B Associates Inc. v. *United States*, 68 Fed. Cl. 765 (2005) 6

Matter of Aldevra, B-411752 (Comp. Gen. Oct. 16, 2015) 15

Matter of Lanier Business Products, 1977 WL 12991 (Comp. Gen. May 11, 1977) 5

Matter of Mission Critical Solutions, 2009 WL 1231855 (Comp. Gen. May 4, 2009) 14

Matter of Savantage Financial Services, Inc., 2013 WL 21663045 (Comp. Gen. June 11, 2003) 7

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TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

15 U.S.C.
§ 644(g)(1)(A) 7
§ 644(j) 15
§ 644(r) 8, 9, 15
§ 657a 14
§ 657a(b)(2)(B) 14
§ 657f(b) 11

31 U.S.C.
§ 1341(a)(1)(B) 6
§ 3551(1)(A) 7

38 U.S.C.
§ 8125 10
§ 8126 10
§ 8127(a) 10
§ 8127(b) 3, 9, 10, 21
§ 8127(c) 3, 9, 10, 21
§ 8127(d) ..... *passim*
§ 8127(e) 20
§ 8127(f) 20
§ 8127(i) 9
§ 8128 ..... 9, 12

41 U.S.C.
§ 152(3) 12
§ 3302(c) 5
§ 3304(a)(1) 21
§ 6301(a) 6
§ 6504(b) 8
§ 7102(a) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Act of Oct. 24, 1978, Pub. L. No. 95-507, 92 Stat. 1757 15

Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 12

Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 16

HUBZone Act of 1997, Pub. L. No. 105-135, 111 Stat. 2627 14

Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 ..... 8, 15

REGULATIONS

13 C.F.R.
§ 125.1(d) 9
§ 125.1(k) 9

41 C.F.R. subpt. 1-3.6 (1978) 15

TABLE OF AUTHORITIES—Continued

Page(s)

48 C.F.R.
§ 2.101 ..... 4, 6, 17, 18, 20
§ 5.101(a)(1) 22
§ 5.202(a) 21
§ 5.203(b) 21
§ 6.302-2 21
§ 7.102(a) 21
§ 8.404(c) 18
§ 8.404(c)(1) 21
§ 8.405-1(d)(2) 5
§ 8.405-1(d)(3) 5
§ 8.405-1(d)(4) 5
§ 8.405-2(b) 5
§ 8.405-2(c) 5
§ 8.405-2(d) 5
§ 8.405-5(a) (2006) 7
§ 8.405-5(a) 13
§ 8.405-5(b) 7
§ 8.406-1 4
§ 8.406-3(a) 4
§ 9.405-1(b) 8
§ 13.203(a)(2) 22
§ 13.203(a)(3) 22
§ 19.502-1(b) 13
§ 19.502-2 (2006) 12
§ 801.602-71 6
§ 810.001 22
§ 819.7005(a) 17
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Page(s)

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H.R. Rep. No. 103-712 (1994) 16

H.R. Rep. No. 109-592 (2006) 2, 11

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INTRODUCTION

The government argued for years—and convinced the Federal Circuit to hold—that the "for purposes of meeting the goals" clause in 38 U.S.C. § 8127(d) limits the mandatory "shall award" language of the statute. Faced with the irrefutable error of that position, the government has now abandoned it and conceded that § 8127(d) "imposes a mandate" (U.S. Br. 24) that does not depend on the agency's progress in meeting the Secretary's annual goals (*id.* 25, 48).

The government's concession cannot save its new position. Nor is the concession the government's first tactical retreat. The VA originally tried to give itself discretion, despite § 8127(d)'s mandatory language, by pointing to provisions in the Federal Acquisition Regulation that exempt Federal Supply Schedule procurements from the small business set-asides *in FAR part 19*. Pet. Br. 17-18. After the Government Accountability Office rejected that view—explaining that FAR part 19 implements the Small Business Act and does not control the application of the separate, VA-specific Rule of Two in § 8127(d)—the VA turned to the "for purposes of" clause as a fallback. *Id.* 19-20.

Now that its fallback has failed as well, the government presents yet another new argument, contending for the first time in this nearly decade-long dispute that the VA need not consider the Rule of Two before placing orders from the FSS program because such orders are not "contracts" within the meaning of § 8127(d). U.S. Br. 25-30. It is no accident that the government never thought of this theory before. The notion that an FSS order requiring a supplier to provide goods or services and obligating the government to pay for them is not a "contract" defies the plain

meaning of the term, a point that even the government concedes. *Id.* 27. Even focusing solely on the context of government acquisitions, the government's new position conflicts with the definition of "contract" in the FAR and the usage of the term in other statutes, including the Small Business Act.

The failure of the government's textual argument leaves only an unsupported assertion that Congress intended the 2006 Veterans Act to operate in the same way as the Small Business Act. But the 2006 Veterans Act was a pointed departure from the Small Business Act, adopted because two prior amendments to that Act had failed to accomplish Congress's purposes. By creating a mandatory contracting preference specific to the VA, Congress sought to ensure that veteran-owned small businesses are "routinely ... granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15 (2006). Congress did not contemplate an enormous FSS loophole that would exempt as much as 60% of VA procurements.

The VA's own regulations also undercut the government's newly conceived litigating position. The regulations require consideration of the Rule of Two for all "acquisitions," a term that includes placing orders from the FSS program. Although the preamble to the final rule contradicted that command by asserting that the Rule of Two does not apply to FSS orders, the preamble made no mention of any putative distinction between "contracts" and "orders." Instead, it relied on a flawed reading of FAR part 19 that the government has long since abandoned. No deference is owed to the government's *post hoc* rationalization for the VA's action.

Finally, the government's brief is replete with unfounded assertions that mandatory consideration of the Rule of Two will be onerous or will cause VA procurement to grind to a halt. The VA already has a database of eligible veteran-owned small businesses to consult; § 8127(d) applies only if "the award can be made at a fair and reasonable price that offers best value"; the VA retains the option to further streamline the process by awarding sole-source contracts under § 8127(b)-(c); and in the many instances in which the Rule of Two is not met, the VA can use other procedures, including the FSS. Congress made a considered judgment regarding the best way to serve veterans, and this Court should reject the government's invitation to rewrite that mandate.

Even the government concedes that the Federal Circuit's decision was wrong with respect to open-market purchases, and the government's attempt to carve out an exemption for FSS orders is meritless. The judgment should be reversed.

I. SECTION 8127(d) REQUIRES THE VA TO CONSIDER THE RULE OF TWO BEFORE USING THE FSS PROGRAM

A. The Government's Textual Distinction Between "Contracts" And "Orders" Fails

1. Section 8127(d) applies when the VA "award[s] contracts." The government acknowledges (at 27) that, by placing an FSS order, a contracting officer "creates further contractual obligations" and that issuing such an order "could reasonably be described" as awarding a contract under the plain meaning of "contract." *See, e.g.*, *Black's Law Dictionary* 341 (8th ed. 2004). Its entire case therefore rests on establishing that "contract" as used in § 8127(d) has a specialized meaning, excluding FSS orders. That textual argument fails.

First, the government never confronts the *definition of "contract"* in the FAR. Since the FAR was first promulgated, it has defined a "contract" as any "mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them," including "all types of commitments that obligate the Government to an expenditure of appropriated funds." 48 C.F.R. § 2.101; *see Establishing the Federal Acquisition Regulation*, 48 Fed. Reg. 42,102, 42,107 (Sept. 19, 1983).[1] If Congress intended to adopt any specialized meaning of "contract" in § 8127(d), it would be the FAR definition.

Applying that definition, an order under a pre-existing FSS contract is itself a "contract." Placing the order creates a "mutually binding legal relationship" and "obligate[s] the Government to an expenditure of appropriated funds." Even though the FSS contract may be with the GSA, the order creates an enforceable obligation between the supplier and *the ordering agency*. *E.g.*, 48 C.F.R. § 8.406-3(a) (remedies for the "ordering" agency if "a contractor delivers a supply or service" that "does not conform to the order"). The order also specifies the performance to be rendered. *Id.* § 8.406-1(d) ("Orders shall include," among other things, key terms such as "Quantity," "Delivery time," and "price").

Accordingly, the GAO has found that the "issuance of a purchase/delivery order pursuant to an FSS con-

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[1] The FAR also provides a non-exhaustive list of examples of "contracts"—including "awards" and various "orders." 48 C.F.R. § 2.101. The most comprehensive dictionary of procurement terms further confirms that "contract" is used broadly in this context. Nash et al., *The Government Contracts Reference Book* 121 (2d ed. 1998).

tract generally gives rise to a legal and binding contract incorporating both the FSS contract provisions and the specific terms of the purchase/delivery order." *Matter of Lanier Bus. Prods.*, 1977 WL 12991, at *2 (Comp. Gen. May 11, 1977); *see also, e.g.*, *AmerescoSolutions, Inc.*, ASBCA Nos. 56824 & 56867, 11-1 BCA ¶ 34,705, at 170,905 (2011) (FAR definition of "contract" is "sufficiently comprehensive to include 'delivery' orders").

Second, the government's attempt to categorically exclude FSS orders from the term "award[ing] contracts" ignores the procedures for placing orders. For services, a contracting officer often must generate a "statement of work"—*i.e.*, a "description of work to be performed" that fills in important details not specified in the schedule itself. 48 C.F.R. § 8.405-2(b). The officer must then issue a request for quotation and evaluate the responses from solicited FSS contractors that are interested. *Id.* § 8.405-2(c)-(d). Only then does the officer place an "order" that requires the contractor to perform and the government to pay for the *particular* task described in the statement of work.

Similarly, for orders above the simplified acquisition threshold (generally $150,000), the contracting officer cannot simply shop from a marketplace. Instead, the officer generally must issue a request for quotation and solicit competitive offers from multiple schedule contractors. 48 C.F.R. § 8.405-1(d)(2)-(4); *see* 41 U.S.C. § 3302(c) (requiring competition); Iraq & Afg. Veterans Br. 14-18 (FSS "orders" are used for multi-million dollar procurements requiring complex acquisition procedures).

These procedures rebut the government's attempt to categorically distinguish between placing orders and "award[ing] contracts." Rather, for "multi-award con-

tracts, such as ... FSS contracts," "the underlying contract is simply an invitation to participate in future competitions for *contracts*." *LB&B Assocs. Inc.* v. *United States*, 68 Fed. Cl. 765, 772 (2005) (emphasis added).

Third, the government's crabbed reading of "contract" would imperil the FSS program's legal foundation, a central premise of which is that no binding commitment of government funds exists *until* an order is placed. Under federal appropriations law, no employee may "involve [the] government in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B) (Antideficiency Act); *see also* 41 U.S.C. § 6301(a) (Adequacy of Appropriations Act). When GSA began negotiating supply schedules lasting more than one fiscal year, it feared involving "the Government in a contract for a period of time" beyond current appropriations. *Matter of GSA—Multiple Award Schedule Multiyear Contracting*, 63 Comp. Gen. 129, 131 (1983). The GAO concluded, however, that multiyear schedules are permissible precisely because they do "not actually bind the Government to make a payment unless and until it ... issues a purchase order." *Id.* The government's novel theory that in FSS procurements the award of the schedule itself is the only "contract"—*i.e.*, the only "commitment[] that obligate[s] the Government to an expenditure of appropriated funds," 48 C.F.R. § 2.101—would imply that multiyear schedules are unlawful.

Fourth, the VA's own regulations include a chart that refers to "task/delivery *orders* ... includ[ing] orders under Federal Supply Schedule contracts" with an "[a]nticipated *contract* award value" of $500,000 or more. 48 C.F.R. § 801.602-71 (emphases added). The government has also repeatedly referred to the task

order at issue in this case as a "contract." *E.g.*, U.S. Br. 18; Opp. 10; JA13, 31.

Fifth, the government's textual argument is inconsistent with numerous statutes that apply by their terms to "contracts" and yet have been understood to apply to FSS orders. Adopting the government's theory would threaten the settled understanding of a host of other laws.

To start, the Small Business Act—the statute to which the government repeatedly seeks to compare the 2006 Veterans Act—requires the federal government to set annual "goals for procurement contracts awarded to small business concerns." 15 U.S.C. § 644(g)(1)(A). FSS orders are counted as "contracts awarded to small business concerns" for purposes of those annual goals. 48 C.F.R. § 8.405-5(b) ("Orders placed against schedule contracts may be credited toward the ordering activity's small business goals."); *accord* 48 C.F.R. § 8.405-5(a) (2006).

The GAO bid protest statute is similar. With an exception not relevant here, all the procurement activities that may give rise to a "protest" must involve "a contract for the procurement of property or services." 31 U.S.C. § 3551(1)(A). The GAO has interpreted that language to "include[] solicitations and awards of *orders under the FSS*." *Matter of Savantage Fin. Servs., Inc.*, 2013 WL 21663045, at *4 (Comp. Gen. June 11, 2003) (emphasis added).

The Contract Disputes Act likewise applies to procurement "contract[s]." 41 U.S.C. § 7102(a). The government's theory that this term would not apply to disputes about orders is contrary to established practice. *E.g.*, *U.S.I.A. Underwater Equip. Sales Corp.* v. *DHS*,

CBCA No. 2579, 14-1 BCA ¶ 35,503, at 174,026-174,027 (2014) (Disputes Act appeal from FSS order).

Similarly, various statutes disqualify contractors from eligibility for the award of a "contract" as a form of sanction. *E.g.*, 41 U.S.C. § 6504(b) (Davis-Bacon Act). The FAR implements these debarment statutes in part by prohibiting further "orders" under pre-existing FSS "contracts." 48 C.F.R. § 9.405-1(b).

2. Against all this textual evidence, the government's counterexamples of putative distinctions between "contracts" and "orders" are unpersuasive. The government points (at 27-28) to the terminology used in FAR part 8 to distinguish schedule "contracts" from "orders." But that terminology is unremarkable. Distinguishing GSA-negotiated master schedules from agency-specific orders is useful in describing the precise mechanics of the program, but doing so does not imply that FSS "orders" are not also "contracts," as they clearly are under both the plain meaning of the term and the FAR definition. *Supra* pp. 3-5.[2]

The government also relies (at 28-29, 36) on 15 U.S.C. § 644(r), which was enacted in 2010 and which directs the Small Business Administration and GSA to promulgate regulations to permit agencies to "set aside orders placed against multiple award contracts for small business concerns." Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541. However, § 644(r) contradicts the government's textual theory. Congress enacted that law not to create new "order" set-asides, but rather to clarify that the set-

[2] None of the statutes cited by the government (at 28) suggests that Congress uses the term "contracts" to *exclude* "orders" or that orders are not a type of contract.

asides *already* enacted elsewhere in the Small Business Act (using the term "contracts") may be applied to FSS orders. S. Rep. No. 111-343, at 7 (2010) (purpose was "to correct the very mixed record" of set-asides for multiple-award contracts and to "provide[] clear direction" permitting set-asides).

The regulations implementing § 644(r) reflect that understanding. Rather than create entirely new procedures, the regulations incorporate existing set-aside programs. *Set-Asides for Small Businesses*, 76 Fed. Reg. 68,032, 68,033 (Nov. 2, 2011). There would have been no lawful basis for doing so under the government's theory, as the existing Small Business Act set-asides do not (under its view) apply to orders. Moreover, the Small Business Administration implemented § 644(r) by promulgating new definitions that are emphatically at odds with the government's argument. The regulations define the term "contract" as "includ[ing] orders against Multiple Award Contracts," such as "GSA Schedule Contract[s]." *Acquisition Process*, 78 Fed. Reg. 61,114, 61,134 (Oct. 2, 2013) (codified at 13 C.F.R. § 125.1(d), (k)).

3. The government's textual theory also finds no support in the language of the 2006 Veterans Act or surrounding provisions. The government suggests (at 33) that reading "contracts" in § 8127(d) to include FSS orders would render § 8127(i) superfluous, but that is mistaken. Section 8127(d)'s mandate is triggered only when there is a "reasonable expectation that two or more" veteran-owned small businesses will submit offers. When the Rule of Two is not satisfied, such as when there is only *one* eligible business, § 8127(i) requires the VA to prioritize the discretionary set-asides in § 8127(b) and (c) over any other applicable Small Business Act set-asides. And § 8128 in turn requires

the VA to prioritize veterans even *within* those other set-asides. In each case, Congress made clear its intention to consider veterans first, before turning to other potential sources of supply.

The government's reliance (at 30-31) on references to the FSS in 38 U.S.C. §§ 8125-8126 is also misplaced. Both sections were enacted well before the 2006 Veterans Act, and neither addresses the government's putative "contract/order" distinction. Reading § 8127(d) to require the VA to consider veteran-owned small businesses before turning to the FSS program is perfectly congruent with other statutes indicating that the FSS program is an available source of supply. And to the extent those other statutes may make it less likely that the Rule of Two would be satisfied in any particular procurement for the items they cover, it serves only to alleviate the VA's exaggerated policy concerns regarding medical care (*infra* pp. 19-22), not to justify a blanket FSS exemption even when the Rule of Two is met.

Finally, despite abandoning its "goals"-based interpretation, the government reprises its argument (at 32) that the Secretary's "discretion to set goals" under § 8127(a) would be rendered "insignificant." However, the government simply ignores the important role of the goals in fostering transparency and accountability, guiding the discretionary use of § 8127(b) and (c), and shaping training and outreach efforts. Pet. Br. 37-38.[3]

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[3] It is far from clear that the VA has met its goals in practice. The government complains (at 52-53) that "[t]he record in this case does not include any evidence" of the inaccuracies that led the VA's chief procurement officer to become a whistleblower (*see* Pet. Br. 24 n.2, 57-58). But that uncertainty is precisely why a remand would be necessary if, notwithstanding the government's conces-

B. The Government's Analogy To The Small Business Act Also Fails

Unable to rely on the statutory text, the government seeks to ground its argument in the "statutory and regulatory backdrop" against which § 8127(d) was enacted, specifically the exemption of FSS orders from Small Business Act set-asides. U.S. Br. 27. That enterprise is flawed from start to finish.

1. Much of the government's brief proceeds from the false premise that "Congress intended for Section 8127 to operate in the same fundamental way as the prior small-business contracting preferences upon which it was modeled." U.S. Br. 30. Congress enacted the 2006 Veterans Act after two prior amendments to the Small Business Act failed. Members of Cong. Br. 9. Rather than enact another discretionary government-wide set-aside in the Small Business Act, Congress changed course and created a mandatory set-aside specific to the VA—changing the statutory language from "may" to "shall" and placing the new provision outside the Small Business Act. *Compare* 15 U.S.C. § 657f(b), *with* 38 U.S.C. § 8127(d); *see also* Pet. Br. 11-13, 30, 41-42. Congress thus intended that veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592, at 14-15 (2006), not relegated to an FSS afterthought. Tellingly, the government nowhere addresses that history.

The government's reading of § 8127(d) would rob Congress's imperative—"shall award"—of much of its force. The government now concedes (at 25) that

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sion and all the arguments to the contrary, the Court were to read the "for purposes of" clause as limiting.

§ 8127(d) is mandatory for open-market acquisitions, but it still maintains (at 51) that the VA "always has discretion" to avoid the mandate by using the FSS program. A "mandate" of such limited scope would hardly have been the centerpiece of the 2006 Veterans Act.

In fact, when Congress enacted § 8127(d), the government-wide Rule of Two for small businesses was *already* mandatory for, at a minimum, all open-market acquisitions above $3,000 (now $3,500). 48 C.F.R. § 19.502-2 (2006); Pet. App. 29a & n.10 (Reyna, J., dissenting). Had Congress merely intended to require the VA to favor veterans when applying the Rule of Two to open-market acquisitions, it would have enacted only § 8128, which requires that veterans be preferred when the VA uses other set-asides. The separate, mandatory Rule of Two in § 8127(d) accomplished almost nothing on the government's reading.

2. Even indulging the government's premise, its analogy to the Small Business Act cannot do the work the government requires. The government reasons (at 26-27) that because prior Small Business Act set-asides applied to "contracts" and had been interpreted not to apply to FSS orders, Congress intended § 8127(d) not to apply to FSS orders because it too uses the term "contracts." That argument fails as a textual matter because the term "contracts" includes "orders." *Supra* pp. 3-8. It also fails as a historical matter.

The FSS program originated in agency practice. U.S. Br. 6-7. When it was placed on express statutory footing in the Competition in Contracting Act of 1984, Congress defined it as a permissible form of "'competitive procedure[]'" only if "participation in the program has been open to all responsible sources." Pub. L. No. 98-369, § 2711, 98 Stat. 1175, 1180 (now codified at 41

U.S.C. § 152(3)). The agencies responsible for the FAR thought that statutory language precluded setting aside orders because the award arguably would no longer be "open to all responsible sources." *E.g.*, *Federal Acquisition Regulation*, 69 Fed. Reg. 34,231, 34,232 (June 18, 2004) (asserting that set-asides are inconsistent with "the basic statutory authority for the program," which "provides that contracts and orders be open to all sources"); *Report of the Acquisition Advisory Panel* 297-299 (2007) (summarizing this view).[4]

The exemption of FSS orders from Small Business Act set-asides thus does nothing to further the government's argument because the exemption has never rested on any supposed distinction between "contracts" and "orders." Indeed, accepting the government's theory would render the very exemptions on which it relies superfluous. *E.g.*, 48 C.F.R. §§ 8.405-5(a), 19.502-1(b). If the term "contract" in the Small Business Act did not include orders, there would have been no reason to exempt FSS orders from Small Business Act set-asides.

3. The regulatory exemption of FSS orders from Small Business Act set-asides reflects the fact that the language of most Small Business Act set-asides is *discretionary*, not mandatory. Pet. Br. 10 (collecting citations). The government tries to sidestep this fact by pointing (at 34-39) to two set-asides in the Small Business Act that used the term "shall." It argues that those provisions were understood in 2006 not to limit agency discretion to use the FSS program, and therefore that the "shall" language in the 2006 Veterans Act

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[4] As noted (*supra* pp. 8-9), 2010 legislation clarified that FSS orders may in fact be set aside under the Small Business Act.

should be understood the same way. However, the language of both provisions is materially different from § 8127(d), their meaning was far from clear in 2006, and neither will be affected by the decision in this case.

The HUBZone provision in 15 U.S.C. § 657a(b)(2)(B)—which was amended in 2010 to say "may"—previously provided that "a contract opportunity shall be awarded pursuant to this section" on the basis of competition restricted to small businesses in historically underutilized business zones if the Rule of Two is satisfied. HUBZone Act of 1997, Pub. L. No. 105-135, § 602(b)(1)(B), 111 Stat. 2627, 2630. Far from having a settled meaning before 2010, the effect of this language was decidedly unclear. No court had considered whether it required consideration of the Rule of Two before placing FSS orders. It was implemented in FAR part 19, which did not apply at the time to FSS orders. *Historically Underutilized Business Zone (HUBZone) Empowerment Contracting Program*, 63 Fed. Reg. 70,265, 70,273 (Dec. 18, 1998). But several courts and the GAO held that § 657a was mandatory and had to be applied before discretionary set-asides. *Contract Mgmt., Inc.* v. *Rumsfeld*, 434 F.3d 1145, 1149 (9th Cir. 2006); *DGR Assocs., Inc.* v. *United States*, 94 Fed. Cl. 189, 207-208 (2010); *Matter of Mission Critical Solutions*, 2009 WL 1231855, at *4 (Comp. Gen. May 4, 2009).[5] When Congress later wished to make the set-aside discretionary, it substituted "may" for "shall," confirming the key textual distinction that the govern-

[5] Even in the government's view, the scope of the statute was limited not by its reference to "award[ing]" a "contract," but rather by other language specific to § 657a. *See* OLC, *Permissibility of Small Business Administration Regulations*, 2009 WL 2870163, at *5 (Aug. 21, 2009).

ment ignores in this case. Small Business Jobs Act § 1346(c), 124 Stat. at 2547.

The government fares no better with 15 U.S.C. § 644(j)(1), which requires that "[e]ach contract" within a certain dollar range (generally $3,500-$150,000) "be reserved exclusively for small business concerns" if the Rule of Two is met. The meaning of that statute is *currently* in dispute even within the government, and thus it could hardly provide the sort of well-established usage critical to the government's textual argument.

As the government acknowledges (at 37 n.8), the Small Business Administration has read § 644(j) to require set-asides of FSS orders. The GSA and GAO have disagreed, but their theory has nothing to do with the term "contract." It relies instead on § 644(r), the statute enacted in 2010 to clarify that Small Business Act set-asides may (but need not) be applied to FSS orders. Letter from Michael D. Tully, GSA, to Paula A. Williams, GAO, 3-4 (Sept. 16, 2015); *see also* Op. 5-7, *Matter of Aldevra*, B-411752 (Comp. Gen. Oct. 16, 2015) (adopting GSA's reasoning); *supra* pp. 8-9 (discussing § 644(r)).

Moreover, the context and history of § 644(j) cloud its meaning compared to the 2006 Veterans Act. When enacted, § 644(j) was limited to contracts "subject to small purchase procedures," a specific form of simplified procedures generally not used in the FSS program. Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221, 92 Stat. 1757, 1771; *see* 41 C.F.R. subpt. 1-3.6 (1978) (procedures for "Small Purchases"); *Small Purchase Set-Asides for Small Business Concerns*, 45 Fed. Reg. 55,721, 55,722 (Aug. 21, 1980) (use of FSS "unaffected" by § 644(j)). In 1994, Congress removed that clause in the course of other revisions, but stated that it did not intend to "al-

ter the current priority among sources of supplies and services," thus creating doubt about whether it intended to mandate consideration of this set-aside before the FSS program. H.R. Rep. No. 103-712, at 213 (1994) (Conf. Rep.); *see* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3243, 3338. The history of the 2006 Veterans Act contains no comparable indication that Congress may have intended to exempt FSS orders from the scope of § 8127(d)'s mandate.

4. Finally, the government cites (at 31 n.6) bills introduced to eliminate loopholes that the VA has tried to create, as though Congress's inaction on those proposals might be a sign of acquiescence. If anything, the post-enactment legislative record reveals that Members of the House Veterans' Affairs Committee, which spearheaded passage of the 2006 Veterans Act, have been sharply critical of the VA's interpretation. *See Follow-up on the [VA] Service-Disabled Veteran-Owned Small Business Certification Process: Hearing before the Subcomm. on Oversight & Investigation of the H. Comm. on Veterans' Affairs*, 112th Congress 1-4, 7-9 (2011); Members of Cong. Br. 3-5.

C. The Veterans Canon Resolves Any Alleged Ambiguity

Section 8127(d)'s mandatory language is unambiguous, but even were there any ambiguity, the veterans canon would require resolving it in favor of the veteran-owned small businesses that Congress sought to assist in enacting the law. Pet. Br. 43-44; American Legion Br. 7-14. The government seeks to dismiss the canon because, in its view, other veterans might be harmed if the VA must consider the Rule of Two before placing FSS orders. That is incorrect (*infra* pp. 19-22),

as underscored by the support of the veterans' community for Kingdomware's position. *E.g.*, American Legion Br. 7-24; National Veterans Small Bus. Coal. Br. 10-23; Paralyzed Veterans of Am. Br. 7-28. In any event, the veterans canon requires construing a benefits statute "in the *beneficiaries'* favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (emphasis added). It thus disfavors the government's attempt to divert contracts from veteran-owned small businesses by engrafting an FSS exemption onto the statute.

II. THE GOVERNMENT'S POSITION IS CONTRADICTED BY VA REGULATIONS AND IS NOT OWED DEFERENCE

The government contends (at 47-50) that the VA's interpretation of § 8127(d) as preserving its discretion to order from the FSS program is entitled to *Chevron* deference. However, as with the government's prior goals-based interpretation, the VA's implementing regulations undercut its current view and confirm that no deference is warranted. Pet. Br. 46-52.

The implementing regulations require contracting officers to "set-aside an *acquisition* for competition" restricted to service-disabled veteran-owned small businesses whenever the Rule of Two is satisfied. 48 C.F.R. § 819.7005(a) (emphasis added); *accord id.* § 819.7006(a) (same, for veteran-owned small businesses). The FAR defines "acquisition" as the entire process of "acquiring by contract with appropriated funds ... supplies or services," from "the point when agency needs are established" through "performance." *Id.* § 2.101. The breadth of the term is underscored by the FAR's definition of "procurement," which simply states

"see 'acquisition.'" *Id.*[6] Issuing an order to procure goods or services from the FSS program is clearly part of conducting an "acquisition." *See, e.g., id.* § 8.404(c) ("[a]cquisition planning" for FSS procurements). Thus, even if the plain text of § 8127(d) did not already mandate consideration of the Rule of Two before placing FSS orders, the implementing regulations would do so.

The government argues (at 49) that these regulations nonetheless do not apply to FSS orders because the VA numbered them to correspond to government-wide regulations in FAR part 19, "plugging" them into the FAR "framework." But nothing in the FAR addresses the VA-specific Rule of Two in § 8127(d), as the GAO held in rejecting essentially this same argument. Pet. Br. 19-20. The VA's regulations do not purport to create any exceptions, nor does the statute permit any.

Unable to rely on the actual regulations, the government asks (at 49-50) for deference to the preamble to its rulemaking, which states that the Rule of Two in § 8127(d) "does not apply to FSS task or delivery orders." *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). As an initial matter, the government does not dispute that the preamble lacks the force of law and was not subject to notice-and-comment procedures. Pet. Br. 50. In any event, the preamble merely underscores the *post hoc* nature of the government's current view. The construction of "contract" now at the heart of the government's case was not addressed in the preamble, which instead mistakenly relied on provisions of the FAR that do not control the separate, VA-specific mandate in § 8127(d). *Id.*

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[6] The government acknowledges (at 18, 21, 25, 30) that issuing an order using the FSS program is a "procurement."

The VA has never before perceived or purported to resolve any ambiguity in the term "contract."

To be sure, the VA has consistently claimed that the 2006 Veterans Act does not limit its discretion to use the FSS program. But it has cycled through evolving and inconsistent legal rationales for doing so, including the new one offered in this Court. And its latest interpretation is premised on a supposedly established usage of the term "contract" in the Small Business Act and the FAR, neither of which is within the VA's expertise. Deference to the agency's "appellate counsel," who also have no particular expertise in this subject and no "'responsibility for elaborating and enforcing statutory commands,'" would likewise be "entirely inappropriate." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 213 (1988).

III. The Government's Policy Disagreement With Congress Does Not Justify An FSS Loophole

Congress had good reason to enact a mandatory, VA-specific contracting preference for small businesses owned by veterans, especially those who have incurred service-related disabilities. Pet. Br. 53-56; Members of Cong. Br. 3 (citing "the tremendous debt of gratitude we owe our men and women in uniform and their families"); *id.* 10 (noting "the failure of prior discretionary policies"). The agency's disagreement with that policy judgment, as applied to the FSS, provides no basis for ignoring Congress's command. The government nonetheless invites this Court to play policymaker by implying that applying the law as written, without an FSS loophole, will harm veterans, depriving some of life-saving medical care. *E.g.*, U.S. Br. 21 ("drugs, medical or surgical supplies, laboratory services"); *id.* 39 ("stents, laparoscopes, critical-care beds," "mortuary

freezer[s]," "cardiologists or nurses"). Those scare tactics are unfounded. Compliance with Congress's mandate would not be onerous for the VA, which exaggerates both the burdens of the Rule of Two and the benefits of the FSS.

First, the government concedes (at 40) that a Rule of Two determination can be "relatively swift." Congress mandated that the VA maintain a database of veteran-owned small businesses and restricted application of the Rule of Two to businesses listed in the database precisely so that contracting officers would have a ready list of eligible veteran suppliers. 38 U.S.C. § 8127(e)-(f); Pet. Br. 55-56.

Second, the Rule of Two requires that contracts be set aside only if there is a "reasonable expectation" that "two or more" veteran-owned small businesses will submit offers "at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). When these criteria are not met, as will often be the case, the contracting officer can quickly revert to other procurement procedures.

Third, § 8127(d)'s internal safeguards regarding a "fair and reasonable price" and "best value" (which means that a contract "provides the greatest overall benefit," 48 C.F.R. § 2.101) ensure that routine application of the Rule of Two will not result in waste. Pet. Br. 37. The government implies (at 43) these safeguards are insufficient to achieve "the cost advantage associated with high-volume buying." But its example of $8 million of savings from increased FSS usage, out of $2.9 billion of spending, hardly outweighs Congress's decision to prioritize the important benefits of supporting veteran-owned small businesses. *See* Paralyzed Veterans of Am. Br. 15-21. As the VA itself has ex-

plained, "[b]uying from [service-disabled veteran-owned small businesses] and [veteran-owned small businesses] directly supports VA's mission. Supporting service-disabled veterans who own businesses contributes significantly in restoring their quality of life while enhancing transition from active duty to civilian life." *VA Acquisition Regulation*, 73 Fed. Reg. 49,141, 49,141 (Aug. 20, 2008).

Fourth, the government decries (at 43) the "red tape" and "delay" of the default procurement procedures for open-market acquisitions. But existing law already allows the use of streamlined procurement procedures when there is an "unusual and compelling urgency" and "the Federal Government would be seriously injured" by following normal procedures. 41 U.S.C. § 3304(a)(1); *see also* 48 C.F.R. § 6.302-2 (authorizing sole-source contracts); *id.* § 5.202(a) (relaxing notice requirements); *id.* § 5.203(b) (considering "urgency" in setting response times).

Congress also already provided a ready alternative. The 2006 Veterans Act authorizes the VA to award sole-source contracts up to the simplified acquisition threshold, or, if the award can be made "at a fair and reasonable price that offers best value" to a "responsible source," up to $5 million. 38 U.S.C. § 8127(b)-(c); Pet. Br. 56. The government's argument (at 43-44) that increased use of these tools would be wasteful once again ignores the statutory "best value" requirement. 38 U.S.C. § 8127(c).

Fifth, the government exaggerates the relative benefits of the FSS program. All government acquisitions are already supposed to begin with planning and market research, the extent of which varies with the amount and complexity of the procurement. 48 C.F.R.

§§ 7.102(a), 8.404(c)(1); *see* GSA, *Multiple Award Schedules Desk Reference* 27-28 (6th ed. 2013); Pet. App. 30a-31a (Reyna, J., dissenting). Indeed, VA contracting officers are already required to consult the VA's database *whenever* they perform market research. 48 C.F.R. § 810.001.

Moreover, the simplified FSS procedures for low-value items mirror similarly simplified procedures for small open-market purchases. 48 C.F.R. §§ 5.101(a)(1), 13.203(a)(2)-(3). From the supplier's perspective, "there is little reason" to obtain an FSS contract if the supplier's "typical order is less than $25,000" because contracting officers "will probably make the purchase using the simplified acquisition procedures in FAR Part 13." McVay, *Getting Started in Federal Contracting* 227 (5th ed. 2009).

Sixth, the categorical FSS exemption that the government seeks is vastly disproportionate to its stated concerns. Consider the contract at issue here, which was valued at $33,824.10 with extension options that could have increased its total value to $101,472.30 over three years. JA31. A contract of that size can provide an invaluable lifeline to a small business owned by a service-disabled veteran and is exactly the type of contract Congress had in mind when it enacted § 8127(d). But without even checking its own database to identify any of the service-disabled veteran-owned small businesses eligible to do the work, the VA went straight to the FSS and conducted a limited-source acquisition in which it requested a quote from, and made the award to, a single, non-veteran-owned business. *Id.* That same scene will play out over and over again unless the law is enforced as written.

There is no evidence in the text of the law, its purpose and structure, or its legislative history to suppose that Congress exempted a substantial portion of the VA's contracting from the mandate in § 8127(d). It did not, and the VA's effort to create an FSS loophole should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS

31 U.S.C. § 1341. Limitations on expending and obligations amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

* * *

31 U.S.C. § 3551. Definitions

In this subchapter:

(1) The term "protest" means a written objection by an interested party to any of the following:

(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

* * *

41 U.S.C. § 6301. Authorization requirement

(a) IN GENERAL.—A contract or purchase on behalf of the Federal Government shall not be made unless the contract or purchase is authorized by law or is under an appropriation adequate to its fulfillment.

* * *

41 U.S.C. § 7102. Applicability of chapter

(a) EXECUTIVE AGENCY CONTRACTS.—Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) made by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair, or maintenance of real property; or

(4) the disposal of personal property.

* * *

13 C.F.R. § 125.1. What definitions are important to SBA's Government Contracting Programs?

* * *

(d) *Contract*, unless otherwise noted, has the same definition as set forth in FAR 2.101 (48 U.S.C. 2.101) and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (*e.g.*, a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).

* * *

(k) *Multiple Award Contract* means a contract that is:

(1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

* * *

48 C.F.R. § 2.101. Definitions.

(a) A word or a term, defined in this section, has the same meaning throughout this regulation (48 CFR chapter 1), unless—

(1) The context in which the word or term is used clearly requires a different meaning; or

(2) Another FAR part, subpart, or section provides a different definition for the particular part or portion of the part.

(b) If a word or term that is defined in this section is defined differently in another part, subpart, or section of this regulation (48 CFR chapter 1, the definition in—

(1) This section includes a cross-reference to the other definitions; and

(2) That part, subpart, or section applies to the word or term when used in that part, subpart, or section.

Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those tech-

nical and management functions directly related to the process of fulfilling agency needs by contract.

* * *

Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

* * *

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

* * *

Procurement (see "acquisition").

* * *

48 C.F.R. § 8.404. Use of Federal Supply Schedules.

* * *

(c) *Acquisition planning.* Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

* * *

48 C.F.R. § 8.405-5. Small business.

(a) Although the preference programs of part 19 are not mandatory in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r))—

(1) Ordering activity contracting officers may, at their discretion—

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3); and

(ii) Set aside BPAs for any of the small business concerns identified in 19.000(a)(3).

(2) When setting aside orders and BPAs—

(i) Follow the ordering procedures for Federal Supply Schedules at 8.405-1, 8.405-2, and 8.405-3; and

(ii) The specific small business program eligibility requirements identified in part 19 apply.

(b) Orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed

with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(c) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at *http://www.gsa.gov/fas* contain information on the small business representations of Schedule contractors.

(d) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE AMERICAN LEGION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. §8127(d). Citing the Act's prefatory clause, however, the Federal Circuit limited the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. §8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 7

I. Review is warranted to establish that lower courts must adhere to this Court's "long applied" rule that statutes must be construed "for the benefit of the veteran." 7

II. In conflict with at least six other circuits, and this Court's post-*Heller* decision in *Hawaii* v. *Office of Hawaiian Affairs*, the majority held that prefatory clauses must trump operative language or become "surplusage." 12

III. The decision below is nationally important because it imperils billions of dollars of benefits Congress intended for veterans. 18

A. The VA's persistent refusal to obey Congress's command diverts from veterans up to $10 billion every year. 19

B. Confirming this case's national importance, Congress strove to overcome the VA's recalcitrance by strengthening the law *three times*. 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Ass'n of Am. R.R. v. *Costle*,
562 F.2d 1310 (D.C. Cir. 1977) 16

Boone v. *Lightner*,
319 U.S. 561 (1943) 8–9, 11

Brown v. *Gardner*,
513 U.S. 115 (1994) 2, 8–11

Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 7

City of Joliet, Ill. v. *New West, L.P.*,
562 F.3d 830 (7th Cir. 2009) 17

CMS Contract Mgmt. Servs. v. *United States*,
745 F.3d 1379 (Fed. Cir. 2014)..... 18

Coffy v. *Republic Steel Corp.*,
447 U.S. 191 (1980) 8, 11

Crawford v. *Burke*,
195 U.S. 176 (1904) 22

District of Columbia v. Heller,
554 U.S. 570 (2008) 2–3, 14–15

Escoe v. *Zerbst*,
295 U.S. 490 (1935) 13

Fishgold v. *Sullivan Drydock & Repair Corp.*,
328 U.S. 275 (1946) 8, 11

Florentine v. *Church of Our Lady of Mt. Carmel*,
340 F.2d 239 (2d Cir. 1965)..... 17

Hawaii v. *Office of Haw. Affairs*,
556 U.S. 163 (2009) 2–3, 14–15

Henderson ex rel. Henderson v. *Shinseki*,
131 S. Ct. 1197 (2011) 2, 7, 9, 11–12

Hooper v. *Bernalillo Cnty. Assessor*,
472 U.S. 612 (1985) 11–12

In re Aldevra,
2011 WL 4826148 (Comp. Gen. Oct. 11, 2011).....
..... 6, 18

In re Aldevra,
2012 WL 860813 (Comp. Gen. Mar. 14, 2012) .....
..... 17–18

Jurgensen v. *Fairfax Cnty., Va.*,
745 F.2d 868 (4th Cir. 1984) 16

King v. *St. Vincent's Hosp.*,
502 U.S. 215 (1991) 2, 8, 11

Kingdomware Techs.—Reconsideration,
2012 WL 6463498 (Comp. Gen. Dec. 13, 2012) .....
..... 19

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*,
523 U.S. 26 (1998) 13

Lopez v. *Davis*,
531 U.S. 230 (2001) 13

Nat'l Wildlife Found. v. *Marsh*,
721 F.2d 767 (11th Cir. 1983) 17

Parish Oil Co. v. *Dillon Cos.*,
523 F.3d 1244 (10th Cir. 2008) 17

Regan v. *Taxation with Representation*,
461 U.S. 540 (1983) 3, 11

Russello v. *United States*,
464 U.S. 16 (1983) 21

Scialabba v. *Cuellar de Osorio*,
134 S. Ct. 2191 (2014) 15

Shinseki v. *Sanders*,
556 U.S. 396 (2009) 11

United States v. *Rodgers*,
461 U.S. 677 (1983) 22

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 15–16

Yazoo & M.V.R. Co. v. *Thomas*,
132 U.S. 174 (1889) 15

STATUTES

15 U.S.C. §644(g) 4

15 U.S.C. §644(h) 4

15 U.S.C. §657f(b) 5, 21

38 U.S.C. §1151 10

38 U.S.C. §8127(b) 6

38 U.S.C. §8127(c) 6

38 U.S.C. §8127(d) 1, 5–8, 10, 13, 21

Pub. L. No. 106-50 §101(3) 4

OTHER AUTHORITIES

GAO Report to Congress, 2012 WL 5510908 (Comp. Gen. Nov. 13, 2012) 6, 19

H.R. Rep. No. 109-592 1

Miller, K., *Dispute Simmers Between VA and Veteran-Owned Businesses*, Wash. Post, 2011 WLNR 23483727 (Nov. 14, 2011). 20

Rule 37.2(a) 1

Rule 37.6 1

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In a decision that eviscerates the rights of 2.5 million veteran-owned businesses to participate in an important government contract program, a divided panel of the Federal Circuit violated this Court's precedent and Congress's command that veterans "shall" participate in the program. That word was chosen carefully. It was enacted in a *third* revision by Congress directed specifically to the Department of Veterans Affairs (the "VA") after it failed to heed Congress's first two, merely permissive, enactments. Review is urgently needed because the majority's decision conflicts with two of this Court's critical canons of statutory construction—one of which is specially tailored to veterans. In the process, the majority below snuffed out the rights of veterans to contracts estimated at up to $10 billion per year.

Here is what happened. In the late 1990s, the number of federal contracts awarded to veterans languished at around one percent. After twice attempting to cajole all federal agencies to raise that number, Congress threw down the gauntlet to the VA, which it believed should "set the example." H.R. Rep. No. 109-592, at 16. So long as conditions concededly satisfied here are met, Congress instructed, the VA "shall award" contracts to veteran-owned small businesses. 38 U.S.C. §8127(d). As the dissent below emphasized, by using "shall," the statute "could not be

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* Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties have consented. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

clearer." Pet. App. 23a. Yet the majority overthrew that mandate by invoking its purpose statement—"for the purposes of meeting the goals" of the statute—which the majority thought gave the VA "discretion" to award contracts to *non*-veterans. Pet. App. 17a. According to the majority, if the purpose statement did not override the operative word "shall," the purpose would be "superfluous." Pet. 20a. The majority never explained how its approach did not render superfluous the operative word "shall." Pet. 25.

Further, as we will show in this brief, the majority's reasoning violates two controlling canons of statutory construction established by this Court. *First*, as explained below in Section I, it is a "basic rule[] of statutory construction" that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n.9 (1991). To be sure, the statute here is clear. "Shall" means shall. And the VA's own regulation squarely *favors* petitioner. Pet. 30-32. But even if the purpose clause created some doubt, and even in the face of a conflicting regulation by the VA, any "interpretive doubt" would have to "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see also *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1205-1206 (2011) (same)). The majority ignored this.

Second, as the dissent showed, "a prefatory clause does not limit or expand the scope of the operative clause." Pet. 26a (citation omitted). Although the dissent relied for this point on *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which involved the Constitution, this Court applies the principle to all "federal legislation." *Hawaii* v. *Office of Haw. Affairs*,

556 U.S. 163, 175 (2009). "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation * * * a court has no license to make it do what it was not designed to do." *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather than focusing on the operative words," the majority here "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." 556 U.S. at 175. In the process, the majority split with at least six other circuits, all of which hold that purpose language cannot control operative language. See Section II, *infra*.

Finally, review is needed because this case is nationally important. See Section III, *infra*. Left undisturbed, the decision below erases the rights of millions of veteran-owned businesses, robbing them of billions of dollars of contracts each year. That thwarts "[o]ur country['s] * * * long standing policy of compensating veterans," as they "have been obliged to drop their own affairs and take up the burdens of the nation." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). Certiorari should be granted to protect the vital economic opportunities that Congress sought to secure three times.

These opportunities could hardly be more important to the American Legion's three million members. Chartered by Congress in 1919, the American Legion is a community-service organization that routinely assists veterans in matters involving the VA. Among other services, the American Legion helps veterans transition to the civilian economy. This is the same critical transition that Congress sought to ease with the statutory rights here, which have now been destroyed by the VA and the majority below.

STATEMENT

1. This case involves three attempts by Congress to compel federal agencies to favor veterans in awarding government contracts. In its first attempt, the Veterans Entrepreneurship and Small Business Development Act (the "1999 Act"), Congress set an annual goal that at least three percent of contracts be awarded to service-disabled veteran-owned small businesses, and required that agencies falling short of this goal "justif[y]" their failure. 15 U.S.C. §644(g), (h). As Congress explained, it had "done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy * * * by forming and expanding small business enterprises." Pub. L. No. 106-50 §101(3). Although the vote was unanimous, some groups, including the American Legion, expressed concern that it did not go far enough. See P. Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 Pub. Cont. L.J. 125, 130 (2006).

The American Legion proved to be right. It quickly became clear that the 1999 Act was a failure, as agencies fell far short of the three percent goal. Pet. App. 4a. In fact, from 2001 to 2002, the percentage of contracts awarded to service-disabled veteran-owned businesses *fell*—from 0.22 percent to a mere 0.12 percent. Sherman, *supra*, at 131.

2. In response to the 1999 Act's failure, Congress passed the Veterans Benefits Act of 2003 (the "2003 Act"), which gave agencies substantial flexibility to favor veterans. Under the 2003 Act, an agency "*may* award" a contract while restricting competition to service-disabled veteran-owned businesses. 15 U.S.C.

§657f(b) (emphasis added). The only stipulation was what is known as the "Rule of Two"—namely, that the agency have "a reasonable expectation that not less than 2 [such businesses] will submit offers and that the award can be made at a fair market price." *Ibid.* This flexible approach failed, too. By 2005, service-disabled veteran-owned businesses were receiving barely a half percent of contracts. Pet. App. 5a.

3. Determined to solve the problem, Congress went back to the drawing board in 2006, this time drafting a law (i) with mandatory provisions, (ii) benefiting all veteran-owned small businesses, and (iii) focusing on the VA, which should "set the example among government agencies." Pet. App. 5a-6a, 16a. The result was the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "2006 Act"). With certain exceptions, the 2006 Act requires the VA to award contracts to veteran-owned small businesses whenever the Rule of Two is met:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] ***shall award*** contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers[.]

38 U.S.C. §8127(d) (emphasis added). By contrast, the exceptions in subsections (b) and (c) are discretionary, providing that the VA "*may* use" other procedures or "*may* award" contracts to other busi-

nesses (assuming certain conditions apply). *Id.* §§8127(b), (c) (emphasis added).

4. Despite the command that the VA "shall" set aside contracts where the Rule of Two is met, the VA refused. Between 2011 and 2012, the Government Accountability Office ("GAO") sustained 18 bid protests on the ground that the VA awarded contracts to non-veterans without considering whether veteran-owned small business could satisfy the Rule of Two. GAO Report to Congress, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012). In sustaining the protests, the GAO held that the law's set-aside is "unequivocal" and that "nothing in the [2006] Act * * * provides the agency with discretion" to defy it. *In re Aldevra*, 2011 WL 4826148, at *2 (Comp. Gen. Oct. 11, 2011). Undeterred, the VA announced that it would continue to treat the set-aside as optional. GAO Report to Congress, 2012 WL 5510908, at *4.

5. One of the contractors affected by the VA's intransigence is petitioner, Kingdomware Technologies, a service-disabled veteran-owned small business. Pet. App. 2a. In 2012, the VA awarded a contract for an emergency notification system, a product offered by Kingdomware, to a non-veteran vendor. *Id.* at 9a-10a. Kingdomware filed a protest with the GAO, showing that §8127(d) required the VA to examine whether the contract should have been set aside for veteran-owned small businesses. *Ibid.*

The GAO agreed with Kingdomware, but the VA refused to follow the GAO's recommendations. *Id.* at 10a. Unable to obtain relief, Kingdomware filed a complaint in the U.S. Court of Federal Claims (*id.* at 11a), which found the statute "ambiguous" and deferred to the VA's interpretation as "reasonable" un-

der *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

6. A divided panel of the Federal Circuit affirmed, but on a different ground. Unlike the Claims Court, the majority did not find §8127(d) ambiguous. Rather, it held that the statute's prefatory clause—"for purposes of meeting the goals under subsection (a)"—"unambiguously" grants the VA "discretion" to pass over veteran-owned small businesses when it decides that it can meet its goals. Pet. App. 15a, 17a-20a (Clevenger, J., joined by Prost, C.J.). According to the majority, if the purpose statement did *not* limit the operative clause (ordering that the VA "shall" prefer veterans), the purpose statement would be "superfluous." *Id.* at 20a.

In a forceful dissent, Judge Reyna showed that the "plain language of the 2006 Veterans Act unambiguously requires" the VA to award contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. *Id.* at 22a. Thus, the majority was wrong "[t]o override the [law's] clear imperative" by "rel[ying] on [its] prefatory language," because "a mandate * * * cannot be limited by its prologue." *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

I. Review is warranted to establish that lower courts must adhere to this Court's "long applied" rule that statutes must be construed "for the benefit of the veteran."

The Court should grant review, first, because the decision below conflicts with this Court's "long applied * * * 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 131 S. Ct. at 1206

(2011) (Veterans' Judicial Review Act) (quoting *King*, 502 U.S. at 220-221 n.9). Under this canon, statutes are "always to be liberally construed to protect [veterans], who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (same). That is, courts must adopt "as liberal a construction for the benefit of the veteran as * * * [the statute] permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

A court's task "is to construe the separate provisions of the [statute] as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Ibid.* Any "interpretive doubt" must "be resolved in the veteran's favor.'" *Gardner*, 513 U.S. at 118.

1. The decision below contradicts this "basic rule[] of statutory construction." *King*, 502 U.S. at 574 n.9. To be sure, the statute here yields no "interpretive doubt." *Gardner*, 513 U.S. at 118. As the dissent noted, the "plain language" of the statute "unambiguously requires" that the VA "shall award" contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. Pet. App. 22a-23a. As its only basis for rejecting that "plain meaning," the majority reasoned that §8127(d)'s "purpose" clause overrides its operative clause whenever the VA decides that it "has met the goals set under §8127(a)." *Id.* at 19a-20a. As petitioner shows, that "reading" runs squarely into the principle that "shall" is the language of command. Further, it runs into the black-letter rule that prefatory clauses must never override the plain meaning of operative claus-

es. *Infra* at 12-18. And still further, it collides with the very language of the surrounding statutory clauses, which likewise state the statute's purpose but use the contrasting word of permission: "may." Pet. 24-25.

But even assuming that the statute's purpose statement created some "interpretive doubt" (which was the holding of the Claims Court), any such doubt must be resolved "in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206. The failure of the majority even to mention that obligation was inexcusable.

Notably, in the court below, the government's only answer to the pro-veterans canon was that it "relate[s] to providing veterans' benefits to veterans, not small business set-asides." C.A. Fed. No. 2013-5042, Appellee's Br. 22 n.3. The government never explained why mandatory preferences for veteran-owned *businesses* did not constitute "benefits to veterans." Nor did it offer any principled reason why the canon should not apply here. And there is none, as the set-asides here exist, as do *all* veterans' benefits, to assist those "who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575. The petition should be granted for this reason alone.

2. It is no answer to say that the majority's "interpretation" was "continuously and consistently" preferred by the VA. Pet. App. 8a. For one thing, as petitioner showed, the VA's own regulation commands using the Rule of Two. Pet. 30-32. But even if the VA's regulation allowed flexibility, the pro-veteran canon would still control.

That is the lesson of *Gardner*, in which a veteran began suffering pain after receiving surgery at a VA

medical facility. 513 U.S. at 116. He sought disability benefits under a statute providing compensation for "'an injury or an aggravation of an injury' that occurs 'as the result of hospitalization, medical or surgical treatment'" that is not attributable to the veteran's "willful misconduct." 38 U.S.C. §1151 (1994). Even though the veteran had committed no willful misconduct, the VA denied his claim, citing its own regulation interpreting the statute implicitly to cover only injuries arising from the VA's own "fault-or-accident." 513 U.S. at 117 & n.2.

In a unanimous decision, this Court held that the VA's interpretation "flies against the plain language of the statutory text." *Id.* at 122. In so holding, the Court rejected the VA's "attempt[] to reveal a fault requirement implicit in the text" on the ground "that fault inheres in the concept of compensable 'injury.'" *Id.* at 117. While acknowledging that "'injury' can of course carry a fault connotation," the Court noted that "it just as certainly need not do so." *Ibid.* Thus, "[t]he most * * * that the [VA] could claim on the basis of th[e] term ['injury'] is the existence of an ambiguity." *Ibid.* And although the VA could not "plausibly make even this claim" given the statute's "clear answer against" it, this Court emphasized that any "ambiguity" would be resolved by "the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* at 118, 120.

This is an *a fortiori* case under *Gardner*. "Despite the absence from the statutory language of so much as a word about [discretion] on the part of the VA," the majority below adopted a contrived "interpretation[] in attempting to reveal" a grant of discretion "implicit in" the statute's purpose clause. *Id.* at 117. Yet given the operative clause's command that the

VA "shall award" contracts to veterans (38 U.S.C. §8127(d)), "no such inference can be drawn" (513 U.S. at 117). Even if it could, however, "[t]he most" the VA "could claim on the basis of th[e] [purpose clause] is the existence of an ambiguity"—which must "be resolved in the veteran's favor." *Id.* at 117-118. Yet the majority did not even mention *Gardner*—much less *Henderson*, *King*, *Boone*, *Coffy*, or *Fishgold*. Review is needed to underscore that the Federal Circuit, which has exclusive jurisdiction under the 2006 Act (Pet. 33-34), may not simply ignore this crucial, dispositive principle of statutory construction.

3. Nor is the pro-veteran cannon a mere technicality. It reflects our Nation's collective dedication to care for those who put their lives at risk for the country, a commitment expressed in Congress's labors to strengthen the laws preferring veterans no fewer than three times. *Infra* at 21-22. Simply put, the pro-veteran canon is an expression by the courts of "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). As "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation," Congress "has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan*, 461 U.S. at 550-551. As the pro-veterans canon shows, so have the federal courts.

"The justification for providing a special benefit for veterans," moreover, "has been recognized throughout the history of our country." *Hooper* v. *Bernalillo Cnty. Assessor*, 472 U.S. 612, 626 (1985) (Stevens, J., joined by Rehnquist, J., and O'Connor, J., dissenting). Aside from "expressing * * * gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be

vital to the continued security of our Nation"—which "itself [is] an adequate justification"—this Court and Congress alike have recognized "that military service typically disrupts the normal progress of civilian employment." *Ibid.*

That indisputable fact "justifies * * * benefits-employment preferences," like the one at issue here, which are designed "to facilitate the reentry into civilian society." *Ibid.* As scholars have recognized, that policy dates back to "the Revolutionary War," when "the Continental Congress" first established "veterans benefit packages." Sherman, *supra*, at 126. Since then, Congress has "recognized an obligation to provide economic assistance to its military veterans," much of which has "focused on assisting veterans in reentering the workforce and starting small businesses." *Ibid.*

In short, both the statute here and this Court's pro-veteran canon stem from these time-honored national policies. The court ignored this "solicitude of Congress for veterans," which "is of long standing." *Henderson*, 131 S. Ct. at 1205 (quotations omitted). The petition should be granted.

II. In conflict with at least six other circuits, and this Court's post-*Heller* decision in *Hawaii* v. *Office of Hawaiian Affairs*, the majority held that prefatory clauses must trump operative language or become "surplusage."

In addition to overlooking the pro-veteran canon, the majority conspicuously ignored the bedrock interpretive principle, emphasized by the dissent, that "a prefatory clause does not limit or expand the scope of the operative clause." Pet. 26a (citation omitted). Instead, the majority held the exact opposite—namely,

that if the purpose statement did *not* limit the scope of the operative clause, the purpose statement would be "unnecessary," "surplusage," and "superfluous." Pet. App. 19a-20a. In so doing, the majority set aside this Court's instructions and split with at least six circuits that have addressed this fundamental question of statutory interpretation. Review is needed to bring the Federal Circuit back into alignment.

1. As noted, the statute here commands that, when conditions satisfied here are met, the VA "shall award" contracts to veteran-owned small businesses. 38 U.S.C. §8127(d). That should have been the end of the matter. "[S]hall" is "the language of command" (*Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935)), and it "creates an obligation impervious to * * * discretion" (*Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); accord, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (Congress's "use of a mandatory 'shall' * * * impose[s] discretionless obligations")).

Unable to deny that "shall" is "mandatory language," the majority read "shall" out of the statute. The court limited "shall" to situations where "the VA has decided," in its unbounded discretion, that it is "necessary" to "'meet[] the [VA's] goals'"—the "'purpose[]'" articulated in the statute's introductory clause. Pet. App. 17a (quoting 38 U.S.C. §8127(d)). According to the majority, this reading was required because "each word in a statute should be given effect." Pet. App. 19a. As the majority reasoned, interpreting "shall" as "shall" "assigns no substantive meaning" to statute's stated "goals"; rather, "this goal-setting provision is itself made superfluous." Pet. App. 20a. "Because [petitioner's] plain meaning interpretation * * * reads the words 'for

purposes of meeting the goals[] * * * out of the statute and makes the mandatory goal-setting statutory provision unnecessary, it cannot stand." *Ibid.*

2. In so holding, the majority inverted the proper approach to interpreting purpose statements, as laid down by this Court. To be sure, there is a "general rule that every clause in a statute must have effect." *Heller*, 554 U.S. at 578 n.3. "But where the text of a clause itself indicates that it does not have operative effect, * * * a court has no license to make it do what it was not designed to do." *Ibid.* For that reason, it is a "settled principle of law" that a statute's "prefatory clause does not limit * * * the scope of the operative clause." *Id.* at 578 & n.3 (quotations omitted). Put simply, "operative provisions should be given effect as operative provisions, and prologues as prologues." *Ibid.* This is true whether the purpose appears in a preamble or, as here, in an internal purpose statement. See *id.*; Pet. 26 n.6.

Nor does this principle merely control when interpreting the Constitution, as in *Heller*. Just a year after *Heller*, this Court applied the same principle to a congressional joint resolution, which it referred to as a "statute." *Hawaii*, 556 U.S. at 173. In that case, the question was whether Congress "recognized that the native Hawaiian people ha[d] unrelinquished claims over [certain] lands." *Id.* at 172. As did the Federal Circuit here, the Hawaii Supreme court held that the answer was "clear[]" "[b]ased on a plain reading" of the statute's purpose clauses. *Id.* at 175.

Relying on *Heller*, this Court rejected this reasoning: "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in

federal legislation * * * a court has no license to make it do what it was not designed to do." *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather than focusing on the operative words of the law," the lower court in *Hawaii* "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." *Ibid.*

So too here. As did the Hawaii Supreme Court, the majority ignored that the VA's duties "depend[] entirely on the meaning of the statute's operative provision"—and "not on" any perceived legislative purpose that may or may not "fall within the prefatory clause." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2215 n.3 (2014) (Roberts, C.J., joined by Scalia, J., concurring in the judgment). This is hornbook law. As a leading treatise has noted, clauses that merely "supply reasons" cannot "confer power or determine rights" and thus "may not be used to create ambiguity" about "the scope or effect of a statute." *Sutherland Statutes & Statutory Constr.* §§ 20:3, 20:12, 47.4 (7th ed. 2013). No matter how "narrow[]," preambles "shall not restrain" a statute's command. T. Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law* 43 (2d ed. 1874).

Although emphasized by Judge Reyna in dissent (Pet. App. 26a), the majority below did not even mention the time-honored principle that preambles "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo & M.V.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889). But as this Court recently underscored, "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the

unambiguously expressed intent of Congress." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014) (quotations omitted). Here, "the need to rewrite clear provisions of the statute should have alerted [the VA] that it had taken a wrong interpretive turn." *Id.* at 2446. Review is necessary to make that clear.

3. Review is also needed because the decision below splits with at least six other circuits and the GAO, which historically has received respect in government contracting decisions.

To begin with, the D.C. Circuit has long held that "[a] preamble * * * is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers." *Ass'n of Am. R.R.* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977). "Where," as here, "the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." *Ibid.* Relying on *Costle*, the Fourth Circuit followed suit: "The 'preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.'" *Jurgensen* v. *Fairfax Cnty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984) (quoting *Costle*, 562 F.2d at 1316).

Likewise, the Tenth Circuit emphasizes that, even where a statute's "operative language" is "internally

and irreconcilably inconsistent with the purpose * * * stated in its introductory clause" (and here it is not), it is still improper for a court to "depart[] from [its] literal meaning." *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008). Similarly, the Eleventh Circuit teaches that "[p]reambles to statutes do not impose substantive rights, duties or obligations"; and a statement of "the primary *goal* of the statute" does not alter the scope of a "requirement [that] is statutorily imposed." *Nat'l Wildlife Found.* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983). In the Second Circuit's words, "what is clear from the text" of a statute "cannot be obscured by reliance on the ambiguous general purpose clause." *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241 (2d Cir. 1965). "The latter must accede to the operative text." *Id.* at 241-242.

Ultimately, as the Seventh Circuit has observed, what is at stake is nothing less than the separation of powers. Here, by "rely[ing] on [a] purpose clause[], rather than the concrete rules that [Congress] selected to achieve the stated ends," two unelected judges "bec[a]me effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill.* v. *New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009). As the dissent below noted, by "relying entirely on prefatory language to second-guess Congress['s]" plain command, the majority "depart[ed] from [its] duty to enforce the proper interpretation of the statute regardless of [its] policy views." Pet. App. 22a.

Following these six circuits, the GAO likewise understood—and reaffirmed in 18 bid protests—that the phrase "for purposes of meeting the goals under subsection (a)" merely "explains the purpose for the

mandate"; it "does not create an exception to the mandate." *In re Aldevra*, 2012 WL 860813, at *4 (Comp. Gen. Mar. 14, 2012). Accordingly, "nothing in the [2006] Act * * * provides the [VA] with discretion" to award a contract "without first determining whether the acquisition should be set aside" for veterans. *Aldevra*, 2011 WL 4826148, at *2.

The majority's decision to side with the VA over the GAO was noteworthy because, in light of "the GAO's long experience and special expertise," its findings in "bid protest matters" have long been "give[n] due weight and deference," such that "an agency's decision to disregard a GAO recommendation is exceedingly rare." *CMS Contract Mgmt. Servs.* v. *United States*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (quotations omitted). As the dissent noted, in 15 years, agencies have declined to follow the GAO only 10 times out of 1,099. Pet. 25a.

In sum, review is needed to align the decision below not only with the precedent of this Court and other circuits, but also with the sound analysis of the GAO.

III. The decision below is nationally important because it imperils billions of dollars of benefits Congress intended for veterans.

Review is also needed because the decision below imperils a statutory benefit worth billions of dollars per year, which Congress has tried to establish three times. Members of the American Legion can no longer reasonably turn to Congress for help because the VA is ignoring Congress. And now that the Federal Circuit has sided with the VA, veterans are stymied because, as noted, only the Federal Circuit can hear appeals under the statute here. Pet. 33-34. Thus,

the petition presents an important question of federal law (R. 10(c)), which only this Court can resolve.

A. The VA's persistent refusal to obey Congress's command diverts from veterans up to $10 billion every year.

As official government reports show, the decision below empowers the VA to deny the statutory rights of nearly 2.5 million veteran-owned small businesses.[1] Indeed, as noted, between December 2011 and November 2012 alone, the GAO found that the VA violated the 2006 Act's mandatory set-aside provision 18 times. GAO Report to Congress, 2012 WL 5510908, at *1. Ultimately, the GAO decided that it would "no longer consider protests based only on the argument that the VA must consider setting aside procurements for [veterans]" because the "decision in [this case], together with the VA's position on the meaning of th[e] statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief." *Kingdomware Techs.—Reconsideration*, 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012).

The lost opportunities for veterans are enormous. For example, the VA "faced substantial criticism" after it "made multiple awards to nonveteran offerors on an unrestricted basis"—in violation of the 2006 Act—for a single "multibillion dollar" procurement. J.T. Williams, *Veterans First? VA Should Give Vet Contracting Program Priority*, 47-WTR Procurement

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[1] Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, at 1 (Mar. 2012), *available at* http://www.sba.gov/sites/default/files/393tot.pdf.

Law. 1, 23 (2012). Nor was this unusual. As it did in this case, the VA routinely procures goods and services directly through the Federal Supply Schedule ("FSS")—a network of large, government-wide contractors with notoriously few veteran-owned small businesses—before even considering whether to apply the Rule of Two.

In just one year, the VA used the FSS for $3.26 billion—over one-fifth—of its $16 billion in annual procurements. Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Businesses*, Wash. Post, 2011 WLNR 23483727 (Nov. 14, 2011). Yet a mere 13 percent of those FSS purchases—worth $436 million—went to veteran-owned small businesses. *Ibid.* Thus, the VA's unlawful procurements from the FSS without first conducting market research potentially deprived veteran-owned small-business contractors of up to nearly $3 billion in government contracts in a single year alone. *Ibid.* Indeed, according to the VA itself, up to *60 percent* of $18 billion in annual procurements use the FSS—in which case veterans are being deprived of competing for contracts totaling $10 billion. Pet. 35.

This loss can be traced directly to the VA's illegal reliance on the FSS at a time when almost 2.5 million veteran-owned small businesses stand ready to compete with FSS vendors. Review is needed to stop the VA from funneling billions of dollars in contracting opportunities away from veterans.

B. Confirming this case's national importance, Congress strove to overcome the VA's recalcitrance by strengthening the law *three times*.

Finally, the importance of this case is powerfully underscored by Congress's decision to address the issues here three times. For years, agencies failed to heed earlier statutes, which were merely aspirational. *Supra* at 4-5. "Continuing the trend started with" those statutes, and focusing on the VA, Congress thus "amend[ed] the permissive language of the set aside" provisions for veterans "to make these practices mandatory." Sherman, *supra*, at 135. Consider the contrasting language:

- **2003 Act:** "[A] contracting officer ***may*** award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation" that the Rule of Two is met. 15 U.S.C. §657f(b) (emphasis added).
- **2006 Act:** "[A] contracting officer of the Department ***shall*** award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation" that the Rule of Two is met. 38 U.S.C. §8127(d) (emphasis added).

"The evolution of these statutory provisions supplies further evidence that Congress intended" the 2006 Act to be mandatory. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Nobody disputes that the only other two differences between these clauses—the limitation to "service-disabled" veterans in the 2003 Act

and to "the Department [of Veterans Affairs]" in the 2006 Act—should be given effect. In comparing "the predecessor statute" to the 2006 Act, the majority below likewise should have "discern[ed] Congress's intent" from the "crucial fact" that it "used the word 'shall' rather than the word 'may.'" *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983).

Instead, the majority concluded that Congress had enacted yet another "discretion[ary]" law (Pet. App. 17a), ignoring that "a change in phraseology" in statutory language "creates a presumption of a change in intent" (*Crawford* v. *Burke*, 195 U.S. 176, 190 (1904)). But "Congress would not have used such different language * * * without thereby intending a change of meaning." *Ibid.* Review is needed because this was Congress's third attempt to assist veterans; yet the VA continues to resist the congressional will. Now that the Federal Circuit has sided with the VA, veterans have no other recourse but this Court.

CONCLUSION

What is perhaps most frustrating for veterans is that it is not clear *why* the VA—an agency specifically created to *protect* their interests—is treating the 2006 Act's mandatory set-aside as optional. Regardless, in following the VA's lead, the Federal Circuit majority ignored the plain language of the 2006 Act, Congress's labors that led to that language, and our Nation's tradition of advancing the veteran's cause. It also ignored this Court's binding precedent favoring veterans in statutory interpretation, and split with at least six other Circuits on the significance of prefatory clauses. In so doing, the majority enabled the VA to deprive veterans of billions of dollars in vital contracting opportunities.

For all of these reasons, and those stated by the petitioner and the forceful dissent below, the petition for certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE AMERICAN LEGION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. §8127(d). Citing the Act's prefatory clause, however, the Federal Circuit limited the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. §8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The decision below violates this Court's "long applied" rule that statutes must be construed "for the benefit of the veteran." 7

II. Under settled precedent, prefatory clauses cannot trump operative statutory language. 14

III. The decision below is contrary to Congress's intent of maximizing economic opportunities for our Nation's veterans 21

A. The VA's persistent refusal to obey Congress's command diverts from veterans up to $10 billion every year. 21

B. Confirming Kingdomware's plain reading of the statute, Congress strove to overcome the VA's recalcitrance by strengthening the law *three times*. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Ass'n of Am. R.R. v. *Costle*,
562 F.2d 1310 (D.C. Cir. 1977) 19

Atl. Richfield Co. v. *United States*,
764 F.2d 837 (Fed. Cir. 1985)..... 19

Boone v. *Lightner*,
319 U.S. 561 (1943) 7, 10, 13

Brown v. *Gardner*,
513 U.S. 115 (1994) 6, 8, 10-13

Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984) 5

City of Joliet, Ill. v. *New West, L.P.*,
562 F.3d 830 (7th Cir. 2009) 20

CMS Contract Mgmt. Servs. v. *United States*,
745 F.3d 1379 (Fed. Cir. 2014)..... 20

Coffy v. *Republic Steel Corp.*,
447 U.S. 191 (1980) 7, 13

Crawford v. *Burke*,
195 U.S. 176 (1904) 24

District of Columbia v. *Heller*,
554 U.S. 570 (2008) 6, 16-17

Escoe v. *Zerbst*,
295 U.S. 490 (1935) 15

Fishgold v. *Sullivan Drydock & Repair Corp.*,
328 U.S. 275 (1946) 8, 13

Florentine v. *Church of Our Lady of Mt. Carmel*,
340 F.2d 239 (2d Cir. 1965)..... 19

Hawaii v. *Office of Haw. Affairs*,
556 U.S. 163 (2009) 6-7, 17

Henderson ex rel. Henderson v. *Shinseki*,
562 U.S. 428 (2011) 6-7, 9, 11, 13-14

Hooper v. *Bernalillo Cnty. Assessor*,
472 U.S. 612 (1985) 13-14

In re Aldevra,
2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 4, 20

In re Aldevra,
2012 WL 860813 (Comp. Gen. Mar. 14, 2012) .. 20

Jurgensen v. *Fairfax Cnty., Va.*,
745 F.2d 868 (4th Cir. 1984) 19

King v. *St. Vincent's Hosp.*,
502 U.S. 215 (1991) 5, 7-8, 10, 13

Kingdomware Techs.—Reconsideration,
2012 WL 6463498 (Comp. Gen. Dec. 13, 2012) 22

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*,
523 U.S. 26 (1998) 15

Lopez v. *Davis*,
531 U.S. 230 (2001) 15

Mach Mining, LLC v. *E.E.O.C.*,
135 S. Ct. 1645 (2015) 15

Nat'l Wildlife Found. v. *Marsh*,
721 F.2d 767 (11th Cir. 1983) 19

Parish Oil Co. v. *Dillon Cos.*,
523 F.3d 1244 (10th Cir. 2008) 19

Regan v. *Taxation with Representation*,
461 U.S. 540 (1983) 7, 13

Russello v. *United States*,
464 U.S. 16 (1983) 24

Scialabba v. *Cuellar de Osorio*,
134 S. Ct. 2191 (2014) 17

Shinseki v. *Sanders*,
556 U.S. 396 (2009) 13

United States v. *Rodgers*,
461 U.S. 677 (1983) 24

United States v. *White*,
2012 WL 4513489 (S.D.N.Y. Oct. 2, 2012) ... 10-11

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 18

White v. *United States*,
543 F.3d 1330 (Fed. Cir. 2008)..... 19

Yazoo & M.V.R. Co. v. *Thomas*,
132 U.S. 174 (1889) 18

STATUTORY PROVISIONS

15 U.S.C.

§644 2

§657f 3, 23

38 U.S.C.

§1151 12

§8127 ..... 3-5, 8, 12, 15, 24

Pub. L. No. 106-50, 113 Stat. 233 2

Pub. L. No. 108-183, 117 Stat. 2651 2

Pub. L. No. 109-461, 120 Stat. 3403 3

OTHER AUTHORITIES

48 C.F.R. §819.7003(d) 6, 10

GAO Report to Congress, 2012 WL 5510908 (Comp. Gen. Nov. 13, 2012) 4, 21

Miller, Kathleen, *Dispute Simmers Between VA and Veteran-Owned Businesses*, Wash. Post, 2011 WLNR 23483727 (Nov. 14, 2011)..... 22

Scalia, A. & Garner, B., *Reading Law* (2012)..... 16

Sedgwick, T., *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law* (2d ed. 1874) 18

Sherman, P., *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 Pub. Cont. L.J. 125 (2006)..... 2, 14, 23

Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners* (Mar. 2012)..... 21

Sutherland Statutes & Statutory Constr. (7th ed. 2013)..... 18

Williams, J.T., *Veterans First? VA Should Give Vet Contracting Program Priority*, 47-WTR Procurement Law. (2012)..... 22

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In a decision that eviscerates the rights of 2.5 million veteran-owned businesses to participate in an important government contract program, a divided panel of the Federal Circuit violated this Court's precedent and Congress's command that veterans "shall" participate in the program. That word was chosen carefully. It was enacted in a *third* revision directed specifically to the U.S. Department of Veterans Affairs ("VA") after it failed to heed Congress's first two enactments, which were permissive. Reversal is needed because the Federal Circuit's decision flouts two of this Court's critical canons of statutory construction—one of which is specially tailored to veterans—and contravenes the expressly stated intent of Congress. In the process, the court below snuffed out the rights of veterans to contracts estimated at up to $10 billion per year.

These rights could hardly be more important to the American Legion's three million members. Chartered by Congress in 1919, the American Legion is a community-service organization that routinely assists veterans in matters involving the VA. Among other services, the American Legion helps veterans transition to the civilian economy. This is the same critical transition that Congress sought to ease with the statutory rights here, which have now been destroyed by the VA and the majority below.

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* The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. See R. 37.3(a). No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

STATEMENT

1. This case involves the third of three attempts by Congress to compel federal agencies to favor veterans in awarding government contracts. In its first attempt, the Veterans Entrepreneurship and Small Business Development Act (the "1999 Act"), Congress set an annual goal that at least three percent of contracts be awarded to service-disabled veteran-owned small businesses, and required that agencies falling short of this goal "justif[y]" their failure. 15 U.S.C. §644(g), (h). As Congress explained, it had "done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy * * * by forming and expanding small business enterprises." Pub. L. No. 106-50 §101(3). Although the vote was unanimous, some groups, including the American Legion, expressed concern that it did not go far enough. See P. Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 Pub. Cont. L.J. 125, 130 (2006).

The American Legion proved to be right. It quickly became clear that the 1999 Act was a failure, as agencies fell far short of the three percent goal. Pet. App. 4a. In fact, from 2001 to 2002, the percentage of contracts awarded to service-disabled veteran-owned businesses *fell*—from 0.22 percent to a mere 0.12 percent. Sherman, *supra*, at 131.

2. In response to the 1999 Act's failure, Congress passed the Veterans Benefits Act of 2003 (the "2003 Act"), which gave agencies substantial flexibility to favor veterans. The 2003 Act provided that an agency "*may* award" a contract while restricting competi-

tion to service-disabled veteran-owned businesses. 15 U.S.C. §657f(b) (emphasis added). The only stipulation was what is known as the "Rule of Two"—namely, that the agency have "a reasonable expectation that not less than 2 [such businesses] will submit offers and that the award can be made at a fair market price." *Ibid.* This flexible approach failed, too. By 2005, service-disabled veteran-owned businesses were receiving barely a half percent of contracts. Pet. App. 5a.

3. Determined to solve the problem, Congress returned to the drawing board in 2006, this time drafting a law (i) with mandatory provisions, (ii) benefiting all veteran-owned small businesses, and (iii) focusing on the VA, which should "set the example among government agencies." Pet. App. 5a-6a, 16a. The result was the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "2006 Act"), which, with certain exceptions, requires the VA to award contracts to veteran-owned small businesses whenever the Rule of Two is met:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the [VA] ***shall award*** contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers[.]

38 U.S.C. §8127(d) (emphasis added). By contrast, the exceptions in subsections (b) and (c) are discretionary, providing that the VA "*may* use" other

procedures or "*may* award" contracts to other businesses (assuming certain conditions apply). *Id.* §§8127(b), (c) (emphasis added).

4. Despite the command that the VA "shall" set aside contracts where the Rule of Two is met, the VA refused. Between 2011 and 2012, the Government Accountability Office ("GAO") sustained 18 bid protests on the ground that the VA awarded contracts to non-veterans without applying the Rule of Two. GAO Report to Congress, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012). In sustaining the protests, the GAO held that the law's set-aside is "unequivocal" and that "nothing in the [2006] Act * * * provides the agency with discretion" to defy it. *In re Aldevra*, 2011 WL 4826148, at *2 (Comp. Gen. Oct. 11, 2011). Undeterred, the VA announced that it would continue to treat the set-aside as optional. GAO Report to Congress, 2012 WL 5510908, at *4.

5. One of the contractors affected by the VA's intransigence is petitioner, Kingdomware Technologies, a service-disabled veteran-owned small business. Pet. App. 2a. In 2012, the VA awarded a contract for an emergency notification system, a product offered by Kingdomware, to a non-veteran vendor. *Id.* at 9a-10a. Kingdomware filed a protest with the GAO, showing that §8127(d) required the VA to examine whether the contract should have been set aside for veteran-owned small businesses. *Ibid.*

The GAO agreed with Kingdomware, but the VA refused to follow the GAO's recommendations. *Id.* at 10a. Unable to obtain relief, Kingdomware filed a complaint in the U.S. Court of Federal Claims (*id.* at 11a), which found the statute "ambiguous" and deferred to the VA's interpretation as "reasonable" un-

der *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

6. A divided panel of the Federal Circuit affirmed, but without finding §8127(d) ambiguous. Rather, the majority held that the statute's prefatory clause—"for purposes of meeting the goals under subsection (a)"—"unambiguously" grants the VA "discretion" to pass over veteran-owned small businesses when it decides that it can meet its goals. Pet. App. 15a, 17a-20a (Clevenger, J., joined by Prost, C.J.). According to the majority, if the purpose statement did *not* limit the operative clause (ordering that the VA "shall" prefer veterans), the purpose statement would be "superfluous." *Id.* at 20a.

In a forceful dissent, Judge Reyna showed that the "plain language of the 2006 Veterans Act unambiguously requires" the VA to award contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. *Id.* at 22a. Thus, the majority was wrong "[t]o override the [law's] clear imperative" by "rel[ying] on [its] prefatory language," because "a mandate * * * cannot be limited by its prologue." *Id.* at 26a.

SUMMARY OF ARGUMENT

The panel majority's reasoning violates two controlling canons of statutory construction established by this Court. It also flouts the statute's plain language, which Congress strengthened three times.

First, as we explain in Section I (*infra* at 7-14), it is a "basic rule[] of statutory construction" that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n.9 (1991). To be sure, the statute here is clear. "Shall"

means shall. And the VA's own regulation confirms this very point. But even if the purpose clause created some doubt, and even in the face of a conflicting regulation by the VA, any "interpretive doubt" still would have to "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see also *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (same).

Unable to contest the importance of this "longstanding canon," the government resorts to arguing that "Section 8127 is not a benefits statute." Opp. 21 n.5. Yet Congress itself called the set-aside here a "benefit" in the very name of the statute—the "Veterans *Benefits*, Health Care, and Information Technology Act of 2006." And the VA calls it a "benefit" in its own regulation. 48 C.F.R. §819.7003(d) ("Any [veteran-owned business] must meet the requirements * * * to receive a *benefit* under this program.") (emphasis added). Thus, even if this Court's pro-veteran canon were limited to formally designated "benefits statutes" (as we will show, it is not), the canon would apply here with full force.

Second, as the dissent below showed, "a prefatory clause does not limit or expand the scope of the operative clause." Although the dissent relied for this point on *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which involved the Constitution, this Court applies the principle to all "federal legislation." *Hawaii* v. *Office of Haw. Affairs*, 556 U.S. 163, 175 (2009). "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation * * * a court has no license to make it do what it was not designed to do.'" *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather

than focusing on the operative words," the majority here "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." 556 U.S. at 175. See Section II (*infra* at 14-21).

Finally, reversal is needed to protect the express statutory rights of millions of veteran-owned businesses. See Section III (*infra* at 21-24). Left uncorrected, the decision below will rob veterans of billions of dollars of contracts each year—in violation of Congress's plain intent. That thwarts "[o]ur country['s] * * * long standing policy of compensating veterans," as they "have been obliged to drop their own affairs and take up the burdens of the nation." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). Reversal is needed to protect the vital economic opportunities that Congress sought to secure three times.

ARGUMENT

I. The decision below violates this Court's "long applied" rule that statutes must be construed "for the benefit of the veteran."

The Court should reverse, first, because the decision below cannot be reconciled with this Court's "long applied * * * 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (Veterans' Judicial Review Act) (quoting *King*, 502 U.S. at 220-221 n.9). Under this canon, statutes are "always to be liberally construed to protect [veterans], who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (same). That is,

courts must adopt "as liberal a construction for the benefit of the veteran as * * * [the statute] permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

A court's task "is to construe the separate provisions of the [statute] as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Ibid.* Any "interpretive doubt" must "be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118.

1. The decision below contradicts this "basic rule[] of statutory construction." *King*, 502 U.S. at 574 n.9. To be sure, the statute here yields no "interpretive doubt." *Gardner*, 513 U.S. at 118. As the dissent noted, the "plain language" of the statute "unambiguously requires" that the VA "shall award" contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. Pet. App. 22a-23a. As its only basis for rejecting that "plain meaning," the majority reasoned that §8127(d)'s "purpose" clause overrides its operative clause whenever the VA decides that it "has met the goals set under §8127(a)." *Id.* at 19a-20a. As Kingdomware shows, that "reading" runs squarely into the principle that "shall" is the language of command. Pet. Br. 29. Further, it runs into the black-letter rule that prefatory clauses must never override the plain meaning of operative clauses. *Infra* at 14-21. And still further, it collides with the very language of the surrounding statutory clauses, which likewise state the statute's purpose but use the contrasting word of permission: "may." Pet. Br. 29-30.

But even assuming that the statute's purpose statement created some "interpretive doubt" (which was the holding of the Claims Court), any such doubt must be resolved "in the beneficiaries' favor." *Henderson*, 562 U.S. at 441. The Federal Circuit's failure even to mention that obligation was inexcusable.

2. As its sole defense, the government asserts that "Section 8127 is not a benefits statute; it is a government-contracting statute." Opp. 21 n.5. But the government cites no authority limiting the pro-veteran canon to "benefits statutes," and *Henderson* confirms that the canon is not so limited. And in any event, the statute here *is* a benefits statute.

We start with *Henderson*, which required construing a statutory time-bar—specifically, by deciding "whether a veteran's failure to file a notice of appeal" to the Veterans Court "within the [statutory] 120-day period" "should be regarded as having 'jurisdictional' consequences." 562 U.S. at 431. The Federal Circuit held that it did, and thus "dismissed [a veteran's] untimely appeal for lack of jurisdiction"—without "allow[ing] equitable tolling of the 120-day deadline," even though the veteran's "illness caused his tardy filing." *Id.* at 433-434.

In reversing the Federal Circuit, this Court relied on the pro-veteran canon: "Particularly in light of this canon, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag." *Id.* at 441. In so doing, the Court gave the 120-day time-bar the same treatment as a "provision for benefits" (*ibid.*), even though the time-bar itself did not benefit veterans at all. To the contrary, if anything, the time-bar by definition cut off benefits. Thus,

Henderson teaches that it is immaterial whether a veterans-related statute itself provides "benefits" or even limits them; "interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 117-118; see also *King*, 502 U.S. at 220 n.9 (applying canon to statute addressing veterans' right to reemployment as civilians).

Regardless, the statute here plainly *is* a "benefits statute," as it mandates that the VA set aside certain contracts for businesses owned by veterans. Indeed, the VA's own regulation describes the statute as providing a "benefit": "Any [veteran-owned business] must meet the requirements in FAR 19.102(f) to receive a *benefit* under this program." 48 C.F.R. §819.7003(d) (emphasis added). This is common sense. And, indeed, the set-aside was enacted as part of the "Veterans *Benefits*, Health Care, and Information Technology Act of 2006." That name was apt, as the set-aside exists, as do all veterans' benefits, to assist those "who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.[1]

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[1] Notably, at least "[f]our U.S. Courts of Appeals have concluded that government contracts that are set aside for disadvantaged or minority-owned businesses fall within the * * * definition of 'government benefits'" in the U.S. Sentencing Guidelines. *United States* v. *White*, 2012 WL 4513489, at *3 (S.D.N.Y. Oct. 2, 2012) (citing *United States* v. *Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009); *United States* v. *Tulio*, 263 F. App'x 258, 260, 263-264 (3d Cir. 2008); *United States* v. *Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-318 (4th Cir. 2000); *United States* v. *Leahy*, 464 F.3d 773, 790 (7th Cir. 2006)).

Following these precedents, the Southern District of New York has held that "[t]he VA contracts set aside for small businesses owned by veterans and service-disabled veterans fall squarely within the definition of government benefits" because the VA's

Grasping at straws, the government insists that "[n]either petitioner here nor any of the judges below relied upon the canon." Opp. 21 n.5. Not so. As the government itself noted in its opposition brief below, "Kingdomware * * * contend[ed] that veterans' legislation including the 2006 Act should be liberally construed for the benefit of veterans." Resp. Ct. App. Br. 22 n.3. Although "the judges below" did not invoke the canon, that is beside the point. The Federal Circuit majority in *Henderson* did not mention it, either (see 589 F.3d 1201 (Fed. Cir. 2009)); and the dissent here did not need to, as it found the statute "unambiguous[]" and "plain" and that, in fact, it "could not be clearer." Pet. App. 22a-23a.

3. Nor is it an answer to say that "th[e] canon would not alter the result here because * * * the VA's interpretation * * * and its own regulations would warrant deference." Opp. 21-22 n.5. For one thing, as Kingdomware has shown, the VA's own regulation commands using the Rule of Two. Pet. Br. 46-48. That alone should settle the issue. But even if the government's "interpretation" had been "continuously and consistently" preferred by the VA (Pet. App. 8a), the pro-veteran canon would still control.

That is the lesson of *Gardner*, in which a veteran began suffering pain after receiving surgery at a VA medical facility. 513 U.S. at 116. He sought disabil-

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set-aside program "is an effort to increase the opportunities for a class of businesses specified by Congress." *Ibid.* (citation omitted). Although this case of course does not involve the Sentencing Guidelines, the sensible reasoning of these cases applies here. Mandating the use of the Rule of Two is an "effort to increase the opportunities for a class of businesses specified by Congress." *Ibid.* It is a benefit.

ity benefits under a statute providing compensation for "'an injury or an aggravation of an injury' that occurs 'as the result of hospitalization, medical or surgical treatment'" that is not attributable to the veteran's "willful misconduct." 38 U.S.C. §1151 (1994). Even though the veteran had committed no willful misconduct, the VA denied his claim, citing its own regulation interpreting the statute implicitly to cover only injuries arising from the VA's own "fault-or-accident." 513 U.S. at 117 & n.2.

In a unanimous decision, this Court held that the VA's interpretation "flies against the plain language of the statutory text." *Id.* at 122. In so holding, the Court rejected the VA's "attempt[] to reveal a fault requirement implicit in the text" on the ground "that fault inheres in the concept of compensable 'injury.'" *Id.* at 117. While acknowledging that "'injury' can of course carry a fault connotation," the Court noted that "it just as certainly need not do so." *Ibid.* Thus, "[t]he most * * * that the [VA] could claim on the basis of th[e] term ['injury'] is the existence of an ambiguity." *Ibid.* And although the VA could not "plausibly make even this claim" given the statute's "clear answer against" it, this Court emphasized that any "ambiguity" would be resolved by "the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* at 118, 120.

This is an *a fortiori* case under *Gardner*. "Despite the absence from the statutory language of so much as a word about [discretion] on the part of the VA," the majority below adopted a contrived "interpretation[] in attempting to reveal" a grant of discretion "implicit in" the statute's purpose clause. *Id.* at 117. Yet given the operative clause's command that the VA "shall award" contracts to veterans (38 U.S.C.

§8127(d)), "no such inference can be drawn" (513 U.S. at 117). Even if it could, however, "[t]he most" the government "could claim on the basis of th[e] [purpose clause] is the existence of an ambiguity"—which must "be resolved in the veteran's favor." *Id.* at 117-118. Yet the Federal Circuit did not even mention *Gardner*—much less *Henderson*, *King*, *Boone*, *Coffy*, or *Fishgold*. That was reversible error. The Federal Circuit, which has exclusive jurisdiction under the 2006 Act (Pet. 33-34), may not simply ignore this crucial principle of statutory construction.

4. Nor is the pro-veteran canon a mere technicality. It reflects our Nation's collective dedication to care for those who put their lives at risk for the country, a commitment expressed in Congress's labors to strengthen the laws preferring veterans no fewer than three times. *Infra* at 23-24. Simply put, the pro-veteran canon is an expression by this Court of "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). As "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation," Congress "has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan*, 461 U.S. at 550-551. As the pro-veteran canon shows, so has this Court.

"The justification for providing a special benefit for veterans," moreover, "has been recognized throughout the history of our country." *Hooper* v. *Bernalillo Cnty. Assessor*, 472 U.S. 612, 626 (1985) (Stevens, J., joined by Rehnquist, J., and O'Connor, J., dissenting). Aside from "expressing * * * gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation"—which

"itself [is] an adequate justification"—this Court and Congress alike have recognized "that military service typically disrupts the normal progress of civilian employment." *Ibid.*

That indisputable fact "justifies * * * benefits-employment preferences," like the one at issue here, which are designed "to facilitate the reentry into civilian society." *Ibid.* As scholars have recognized, that policy dates back to "the Revolutionary War," when "the Continental Congress" first established "veterans benefit packages." Sherman, *supra*, at 126. Since then, Congress has "recognized an obligation to provide economic assistance to its military veterans," much of which has "focused on assisting veterans in reentering the workforce and starting small businesses." *Ibid.*

In short, both the statute here and this Court's pro-veteran canon stem from these time-honored national policies. The court below ignored this "solicitude of Congress for veterans," which "is of long standing." *Henderson*, 562 U.S. at 440 (quotations omitted). This Court should reaffirm its pro-veteran canon and reverse the judgment below.

II. Under settled precedent, prefatory clauses cannot trump operative statutory language.

As the dissent below emphasized, this Court's precedents make clear that "a prefatory clause does not limit or expand the scope of the operative clause." Pet. App. 26a (citation omitted). Instead, the majority held the exact opposite—namely, that if the purpose statement did *not* limit the scope of the operative clause, the purpose statement would be "unnecessary," "surplusage," and "superfluous." Pet. App. 19a-20a. The majority was mistaken.

1. As noted, the statute here commands that, when conditions satisfied here are met, the VA "shall award" contracts to veteran-owned small businesses. 38 U.S.C. §8127(d). That should have been the end of the matter. "[S]hall" is "the language of command" (*Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935)), and it "creates an obligation impervious to * * * discretion" (*Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); accord, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (Congress's "use of a mandatory 'shall' * * * impose[s] discretionless obligations"); *Mach Mining, LLC* v. *E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) ("That language is mandatory"—"the word 'shall' admits of no discretion.")).

Unable to deny that "shall" is "mandatory language," the majority read "shall" out of the statute. Adopting the government's "interpretation," the court limited "shall" to situations where "the VA has decided," in its unbounded discretion, that it is "necessary" to "'meet[] the [VA's] goals'"—the "'purpose[]'" articulated in the statute's introductory clause. Pet. App. 17a (quoting 38 U.S.C. §8127(d)). According to the majority, this reading was required because "each word in a statute should be given effect." Pet. App. 19a. As the majority reasoned, interpreting "shall" as "shall" "assigns no substantive meaning" to the statute's stated "goals"; rather, "this goal-setting provision is itself made superfluous." Pet. App. 20a. "Because [Kingdomware's] plain meaning interpretation * * * reads the words 'for purposes of meeting the goals[']* * * out of the statute and makes the mandatory goal-setting statutory provision unnecessary, it cannot stand." *Ibid.*

2. In so holding, the majority inverted the proper approach to interpreting purpose statements, as laid

down by this Court. To be sure, there is a "general rule that every clause in a statute must have effect." *Heller*, 554 U.S. at 578 n.3. "But where the text of a clause itself indicates that it does not have operative effect, * * * a court has no license to make it do what it was not designed to do." *Ibid.* For that reason, it is a "settled principle of law" that a statute's "prefatory clause does not limit * * * the scope of the operative clause." *Id.* at 578 & n.3 (quotations omitted). Put simply, "operative provisions should be given effect as operative provisions, and prologues as prologues." *Ibid.*

By the government's lights, this fundamental principle applies only to prefatory language "[a]t the beginning of the statute" that "contain[s] the telltale 'whereas' language." Opp. 18-19. Not so. While "[e]xpressions of purpose are usually placed" in a preamble, "they do not have to be." A. Scalia & B. Garner, *Reading Law* 220 (2012). Indeed, in *Heller* itself, the purpose statement appeared in the same sentence as the operative language—not in a preamble—and did not use the word "whereas." An internal purpose statement can no more trump a clear statutory command than a purpose that appears in a preamble. Instead, in every case, the question is whether "the text of a clause itself indicates that it does not have operative effect, *such as* 'whereas' clauses in federal legislation." *Heller*, 554 U.S. at 578 n.3 (emphasis added). Regardless of where such a clause appears, "a court has no license to make it do what it was not designed to do." *Ibid.*

For its part, the government offers no principled reason why it should matter *where* a statement of purpose appears. And there is none. The text at issue here begins with the phrase, "*[f]or purposes of*

meeting the goals under subsection (a)." Because it "announces a purpose" for what follows, that clause is "a prefatory statement of purpose." *Heller*, 554 U.S. at 577. In other words, "the text of [the] clause itself indicates that it does not have operative effect." *Id.* at 578 n.3. Therefore, it has none.

Nor does this principle merely control when interpreting the Constitution, as in *Heller*. Just a year after *Heller*, this Court applied the same principle to a congressional joint resolution, which it referred to as a "statute." *Hawaii*, 556 U.S. at 173. In that case, the question was whether Congress "recognized that the native Hawaiian people ha[d] unrelinquished claims over [certain] lands." *Id.* at 172. As did the Federal Circuit here, the Hawaii Supreme Court held that the answer was "clear[]" "[b]ased on a plain reading" of the statute's purpose clauses. *Id.* at 175.

Relying on *Heller*, this Court rejected this reasoning: "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect * * * a court has no license to make it do what it was not designed to do." *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather than focusing on the operative words of the law," the lower court in *Hawaii* "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." *Ibid.*

So too here. As did the Hawaii Supreme Court, the Federal Circuit ignored that the VA's duties "depend[] entirely on the meaning of the statute's operative provision"—and "not on" any perceived legislative purpose that may or may not "fall within the prefatory clause." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2215 n.3 (2014) (Roberts, C.J., joined by

Scalia, J., concurring in the judgment). This is hornbook law. As a leading treatise notes, clauses that merely "supply reasons" cannot "confer power or determine rights" and thus "may not be used to create ambiguity" about "the scope or effect of a statute." *Sutherland Statutes & Statutory Constr.* §§ 20:3, 20:12, 47.4 (7th ed. 2013). No matter how "narrow[]," preambles "shall not restrain" a statute's command. T. Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law* 43 (2d ed. 1874).

Although emphasized by Judge Reyna in dissent (Pet. App. 26a), the majority below did not even mention the longstanding principle that preambles "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo & M.V.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889). But as this Court has underscored, "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014) (quotations omitted). Here, "the need to rewrite clear provisions of the statute should have alerted [the VA] that it had taken a wrong interpretive turn." *Id.* at 2446.

3. In contrast to the decision below, previous Federal Circuit panels, as well as other circuits and the GAO, have followed this Court's precedent.

Indeed, until this case, the Federal Circuit itself had recognized that "i[n] the case [of] a statute," Congress's "intent is best expressed in the operative provisions," and thus "specific operative provisions

cannot be controlled by general expressions of intent." *Atl. Richfield Co.* v. *United States*, 764 F.2d 837, 840 (Fed. Cir. 1985). "The operative provision[]" here should have "control[led] the outcome of this case" too. *Ibid.* After all, "[p]refatory language does not manufacture an ambiguity in the statute where there is none." *White* v. *United States*, 543 F.3d 1330, 1336 (Fed. Cir. 2008).

Other circuits, too, have held that even where a statute's "operative language" is "internally and irreconcilably inconsistent with the purpose * * * stated in its introductory clause" (and here it is not), it is still improper for a court to "depart[] from [its] literal meaning." *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008) (McConnell, J.). Notably, the "introductory clause" in *Parish* appeared—as it does here—in the same sentence as the statute's "operative language," and began with the phrase, "'[f]or the purpose of.'" *Id.* at 1247 (citation omitted). Yet that did not alter the conclusion that "the operative provision"—and not "its stated purpose"—"must be given effect." *Id.* at 1253, 1249.[2]

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[2] See also *Ass'n of Am. R.R.* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("A preamble * * * is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers."); *Jurgensen* v. *Fairfax Cnty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984) (same); *Nat'l Wildlife Found.* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983) ("Preambles to statutes do not impose substantive rights, duties or obligations"; and a statement of "the primary *goal* of the statute" does not alter the scope of a "requirement [that] is statutorily imposed."); *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241-242 (2d Cir. 1965) ("what is clear from the text" of a statute "cannot be obscured by reliance on the ambiguous general purpose clause," which "must accede to the operative text").

Ultimately, what is at stake here is nothing less than the separation of powers. By "rely[ing] on [a] purpose clause[], rather than the concrete rules that [Congress] selected to achieve the stated ends," two unelected judges "bec[a]me effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill.* v. *New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009) (Easterbrook, J.). As the dissent below noted, by "relying entirely on prefatory language to second-guess Congress['s]" plain command, the majority "depart[ed] from [its] duty to enforce the proper interpretation of the statute regardless of [its] policy views." Pet. App. 22a.

The GAO likewise understood—and reaffirmed in 18 bid protests—that the phrase "for purposes of meeting the goals under subsection (a)" merely "explains the purpose for the mandate"; it "does not create an exception to the mandate." *In re Aldevra*, 2012 WL 860813, at *4 (Comp. Gen. Mar. 14, 2012). Accordingly, "nothing in the [2006] Act * * * provides the [VA] with discretion" to award a contract "without first determining whether the acquisition should be set aside" for veterans. *Aldevra*, 2011 WL 4826148, at *2.

The VA's decision to defy the GAO is extraordinary. In light of "the GAO's long experience and special expertise," its findings in "bid protest matters" have long been "give[n] due weight and deference," such that "an agency's decision to disregard a GAO recommendation is exceedingly rare." *CMS Contract Mgmt. Servs.* v. *United States*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (quotations omitted). As the dissent noted, in 15 years, agencies have declined to follow the GAO only 10 times out of 1,099. Pet. 25a.

In sum, the decision below departs not only from this Court's binding precedent, but also from the Federal Circuit's own law, as well as the sound analysis of other circuits and the GAO. The Court should reverse.

III. The decision below is contrary to Congress's intent of maximizing economic opportunities for our Nation's veterans.

Reversal is also needed because the decision below wipes out a statutory benefit worth billions of dollars per year, which Congress has tried to establish three times. If the Court does not reverse, millions upon millions of veterans will have no avenue left for securing their rights to billions of dollars of critical benefits from the government they risked their lives to serve.

A. The VA's persistent refusal to obey Congress's command diverts from veterans up to $10 billion every year.

As official government reports show, the decision below empowers the VA to deny the statutory rights of nearly 2.5 million veteran-owned small businesses.[3] Indeed, as noted, between December 2011 and November 2012 alone, the GAO found that the VA violated the 2006 Act's mandatory set-aside provision 18 times. GAO Report to Congress, 2012 WL 5510908, at *1. Ultimately, the GAO decided that it would "no longer consider protests based only on the argument that the VA must consider setting

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[3] Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, at 1 (Mar. 2012), *available at* http://www.sba.gov/sites/default/files/393tot.pdf.

aside procurements for [veterans]" because the "decision in [this case], together with the VA's position on the meaning of th[e] statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief." *Kingdomware Techs.—Reconsideration*, 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012).

The lost opportunities for veterans are enormous. For example, the VA "faced substantial criticism" after it "made multiple awards to nonveteran offerors on an unrestricted basis"—in violation of the 2006 Act—for a single "multibillion dollar" procurement. J.T. Williams, *Veterans First? VA Should Give Vet Contracting Program Priority*, 47-WTR Procurement Law. 1, 23 (2012). Nor was this unusual. As it did in this case, the VA routinely procures goods and services directly through the Federal Supply Schedule ("FSS")—a network of large, government-wide contractors with notoriously few veteran-owned small businesses—before even considering whether to apply the Rule of Two.

In just one year, the VA used the FSS for $3.26 billion—over one-fifth—of its $16 billion in annual procurements. Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Businesses*, Wash. Post, 2011 WLNR 23483727 (Nov. 14, 2011). Yet a mere 13 percent of those FSS purchases—worth $436 million—went to veteran-owned small businesses. *Ibid.* Thus, the VA's unlawful procurements from the FSS without first conducting market research potentially deprived veteran-owned small-business contractors of up to nearly $3 billion in government contracts in a single year alone. *Ibid.* Indeed, according to the VA itself, up to *60 percent* of $18 billion in annual procurements use the FSS—in which case vet-

erans are being deprived of the opportunity to compete for contracts totaling $10 billion. Pet. 35.

This loss can be traced directly to the VA's illegal reliance on the FSS at a time when almost 2.5 million veteran-owned small businesses stand ready to compete with FSS vendors. To stop the VA from steering billions of dollars in contracting opportunities away from veterans, the Court should reverse.

B. Confirming Kingdomware's plain reading of the statute, Congress strove to overcome the VA's recalcitrance by strengthening the law *three times*.

Finally, Kingdomware's plain reading of the statute is powerfully underscored by Congress's decision to address the issues here three times between 1999 and 2006. For years, agencies failed to heed earlier statutes, which were merely aspirational. *Supra* at 2-3. "Continuing the trend started with" those statutes, and focusing on the VA, Congress thus "amend[ed] the permissive language of the set aside" provisions for veterans "to make these practices mandatory." Sherman, *supra*, at 135. Consider the contrasting language:

- **2003 Act:** "[A] contracting officer ***may*** award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation" that the Rule of Two is met. 15 U.S.C. §657f(b) (emphasis added).
- **2006 Act:** "[A] contracting officer of the Department ***shall*** award contracts on the basis of competition restricted to small business concerns owned and controlled by

> veterans if the contracting officer has a reasonable expectation" that the Rule of Two is met. 38 U.S.C. §8127(d) (emphasis added).

"The evolution of these statutory provisions supplies further evidence that Congress intended" the 2006 Act to be mandatory. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). In comparing "the predecessor statute" to the 2006 Act, the VA and the Federal Circuit should have "discern[ed] Congress's intent" from the "crucial fact" that it "used the word 'shall' rather than the word 'may.'" *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983).

Instead, the VA and the Federal Circuit concluded that Congress had enacted yet another "discretion[ary]" law (Pet. App. 17a), ignoring that "a change in phraseology" in statutory language "creates a presumption of a change in intent" (*Crawford* v. *Burke*, 195 U.S. 176, 190 (1904)). But "Congress would not have used such different language * * * without thereby intending a change of meaning." *Ibid.* This was Congress's third attempt to assist veterans; yet the VA continues to resist the congressional will. This Court should restore these critical benefits and thereby carry out Congress's unambiguous intent in passing the 2006 Act.

CONCLUSION

What is perhaps most frustrating for veterans is that it is not clear *why* the VA—an agency specifically created to *protect* their interests—is treating the 2006 Act's mandatory set-aside as optional. Regardless, in following the VA's lead, the Federal Circuit majority ignored—and the government here continues to ignore—the plain language of the 2006 Act, Congress's labors that led to that language, and our

Nation's tradition of advancing the veteran's cause. It also ignored this Court's binding precedent favoring veterans in statutory interpretation, and emphasizing the primacy of operative language. In so doing, the majority enabled the VA to deprive veterans of billions of dollars in vital contracting opportunities.

For all of these reasons, and those stated by Kingdomware and the forceful dissent below, the judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. . . . . ii-iv

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*. 1-2

SUMMARY OF THE ARGUMENT. 3-4

ARGUMENT. 4-13

I. Section 8127(d)'s Unqualified, Mandatory Language Stands Out From Other Federal Contracting Set-Aside Laws And Expresses Congress's Intent That VA Acquisitions Routinely Be Set-Aside For Veterans. 4-9

II. The Majority Below Misread Section 8127(d) And Failed To Give Effect To Congress's Mandate. 9-13

CONCLUSION. 13-14

TABLE OF AUTHORITIES

Page(s)

CASES

Adams & Associates, Inc. v. United States,
109 Fed. Cl. 340 (2013). 8

Connecticut National Bank v. Germain,
503 U.S. 249 (1992). 13

District of Columbia v. Heller,
554 U.S. 570 (2008). 11, 12-13

Edmond Scientific Co.,
B-410179, B-410179.2, November 12th, 2014,
2014 U.S. Comp. Gen. LEXIS 322. 8

Kingdomware Technologies, Inc. v. United States,
754 F.3d 923 (Fed. Cir. 2014). 4, 5, 8, 12-13

Starlight Corporation, Inc.,
B-410471.2, December 30th, 2014,
2014 U.S. Comp. Gen. LEXIS 374. 7-8

Toyota Motor Mfg. Ky., Inc. v. Williams,
534 U.S. 184 (2002). 7

Walker Development & Trading Group,
B-411357, July 8th, 2015,
2015 U.S. Comp. Gen. LEXIS 190. 9

CONSTITUTION AND STATUTES

U.S. CONST. amend. II. 9-10, 11

15 U.S.C. § 644(a)(3). 6

15 U.S.C. § 644(g)(1)(A)(i). 6

15 U.S.C. § 644(g)(1)(A)(ii). 4

15 U.S.C. § 644(r). 8

38 U.S.C. § 8127(c). 3, 9

38 U.S.C. § 8127(d). . . . . *passim*

REGULATIONS

48 C.F.R. ("FAR") § 8.404(a). 8, 9

FAR § 16.505(b)(2)(i)(F) 8

FAR § 19.000(a). 7

FAR § 19.502-2(b). 6, 8

FAR § 19.502-4. 8

FAR § 19.502-6(f) 3, 7, 11

FAR § 38.101(b). 9

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H.R. Rep. No. 109-592 (2006). 6

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Rule 37.6. 1

United States Small Business Administration's Small Business Dynamic Search (http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm). . . . 7

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit (the "Federal Circuit"). The FCBA brings together different groups across the Nation that practice before the Federal Circuit, seeking to strengthen and serve that Court by providing a forum for discussion of common concerns of the Federal Circuit and its Bar.

One purpose of the FCBA is to render assistance to the Federal Circuit and this Court in appropriate instances by submitting its views on legal issues presented in individual cases. Such submissions further the core mission of the FCBA, which includes a responsibility to promote the public interest by providing the views of informed practitioners in the subject-matter areas over which the Federal Circuit has jurisdiction.

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[*] FCBA members who are Government employees played no role in deciding whether to file this Brief or in developing the content of this Brief. The parties have filed blanket consents to *amicus curiae* briefs in support of either party or neither party. After reasonable investigation, FCBA asserts that: (a) no member of its Board or *amicus* Committee who voted to prepare this Brief, or any attorney in the law firm or corporation of such a member, represents a party here, (b) no counsel for any party has authored this Brief in whole or in part, and (c) no person or entity, other than *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this Brief. *See* Rule 37.6.

This Case touches on two areas over which the Federal Circuit has exclusive jurisdiction—Federal procurement law and Veterans law. The FCBA and its members have extensive experience with both areas of law and a vested interest in their stability and predictability.

Petitioner Kingdomware successfully invoked the statutory mandate of 38 U.S.C. § 8127(d) in proceedings before the United States Government Accountability Office ("GAO"), but a differing result was obtained before the United States Court of Federal Claims, a differing result then sustained over a vigorous dissent by a Panel majority of the Federal Circuit. The FCBA respectfully submits that a complete understanding of the history and context of Section 8127(d) is necessary to directly answer this important question.

SUMMARY OF THE ARGUMENT

The Statute is the product of Congress's repeated efforts to increase the opportunities for Veterans to participate in Federal Government Contracts. Section 8127(d) differs from other Small Business Set-Asides in both its mandatory nature and in the absence of qualifications and exceptions found in other Set-Asides. Indeed, the *only* stated exception to Section 8127(d)'s "Rule of Two" requirement that Acquisitions be set aside for Veteran-Owned Small Businesses ("VOSBs") is the discretionary authority granted to Contracting Officers to award Contracts *directly* to VOSBs *without* a Competition. 38 U.S.C. § 8127(c).

The Panel majority below erred in construing Section 8127(d)'s mandatory Set-Aside requirement as discretionary once the Department of Veterans Affairs ("VA") has met its VOSB contracting goals. That construction is inconsistent with the plain meaning of the Statute, as well as with the Regulations generally applicable to Small-Business Set-Asides, which provide that Agencies are not excused from setting aside Procurements simply because "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services." 48 C.F.R. ("FAR") § 19.502-6-(f). Although these Regulations do not directly govern Set-Asides pursuant to Section 8127(d), Congress was presumably aware of this general principle when it enacted Section 8127, and, as discussed below, Congress's language evidences an intent to provide great-

er—not fewer—contracting opportunities to Veterans. It was not a "concession" for Petitioner Kingdomware to argue that Section 8127(d)'s statutory mandate continues in full force and effect throughout each Fiscal Year even after the VA has met its VOSB contracting goals. This result follows directly from the plain meaning of the Section 8127(d) as well as from Regulatory policy applicable to Set-Asides generally at the time Section 8127 was enacted.

ARGUMENT

I. Section 8127(d)'s Unqualified, Mandatory Language Stands Out From Other Federal Contracting Set-Aside Laws And Expresses Congress's Intent That VA Acquisitions Routinely Be Set-Aside For Veterans.

Section 1827 is the product of years of Congressional frustration with the Government's persistent failure to provide meaningful opportunities for VOSBs and for Service-Disabled Veteran-Owned Small-Businesses ("SDVOSBs") to participate in Federal Contracts. Congress attempted to rectify this failure in 1999, amending the Small Business Act to establish a Government-wide goal of awarding 3% of Government Contracts to SDVOSBs. 15 U.S.C. § 644(g)(1)(A)(ii). Federal Agencies failed to meet that 3% goal. *Kingdomware Technologies, Inc. v. United States*, 754 F.3d 923, 926 (Fed. Cir. 2014).

Consequently, Congress amended the Small Business Act again in 2003 to provide that Federal Contracting Officers "*may* award" sole-source Contracts of restricted dollar amounts to SDVOSBs, and "*may* award" Contracts based on Competitions restricted to SDVOSBs "if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by [SDVOSBs] will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f(b). Notwithstanding this *discretionary* authority, Federal Agencies continued to fail to meet Congress's 3% contracting goal for SDVOSBs. *Kingdomware*, 754 F.3d, at 926.

Congress therefore acted once again in 2006, but this time with *mandatory* legislation targeted specifically at the VA. The Veterans Benefits, Health Care and Information Technology Act of 2006, codified at 38 U.S.C. § 8127(d), provides that VA Contracting Officers "*shall* award" contracts on the basis of Competitions restricted to SDVOSBs and VOSBs if the VA Contracting Officer has a "reasonable expectation" that: (1) two or more SDVOSBs or VOSBs will submit offers, and (2) that "award can be made at a fair and reasonable price that offers the best value to the United States."

The bill's sponsor, U.S. Representative John Boozman, explained the change in language from "may" to "shall" in Section 8127's legislative history, stating that "[t]he bill will essentially change what has been a 'may' to a 'shall' in terms of goals." *H.R. 3082, The Veteran-Owned Small Business Promotion*

Act of 2005 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans Affairs, 109th Cong. 2 (2005) (statement of Rep. John Boozman, Member, H. Comm. on Veterans Affairs). The Committee on Veterans Affairs' Report accompanying the legislation further explained that "small businesses owned and controlled by veterans and service-disabled veterans should *routinely* be granted the *primary* opportunity to enter into VA procurement contracts." H.R. Rep. 109-592, at 14–15 (2006) (emphases added).

Since 1984, Small Business Set-Asides, which are permitted when the so-called "Rule of Two" is met, have been used to implement the statutory requirement, 15 U.S.C. § 644(a)(3), that Small Businesses receive "a fair proportion of the total purchases and contracts for property and services for the Government." Congress has defined this required "fair proportion" as yearly minimum Government-wide percentage goals, *i.e.*, marketplace participation for all Small Business concerns of "not less than 23 percent of the total value of all prime contract awards for each fiscal year," 15 U.S.C. § 644(g)(1)(A)(i). Section 8127(d) provides a special and additional instance of Set-Asides when its "Rule of Two" is met.

The Rule of Two which applies generally to Small Business Set-Asides is set out at FAR § 19.502-2(b), and it provides that Competitions for Acquisitions over $150,000 will be reserved for exclusive Small Business participation when there is a reasonable expectation of making an Award at a fair market

price on Offers obtained from at least two responsible Small Business concerns. Critically, FAR § 19.502-6-(f) provides that Contracting Officer Rule of Two assessments are not excused even if "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services." In other words, Contracting Officers may *not* decline to undertake Rule of Two assessments even though Government-wide restricted Competition goals for a particular Fiscal Year have already been met. Although FAR Part 19 does not apply to Set-Asides under Section 8127(d), *see* FAR § 19.000(a), Congress presumably was aware of this established regulatory regime when it essentially codified a special instance of the Rule of Two in Section 8127(d).[1] *See, e.g., Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) (Congress's use of terms with an established regulatory meaning "generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.").[2]

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[1] In 2006, the rule that Set-Asides are required irrespective of whether contracting goals for a particular year have been met was located at FAR § 19.502-5(f).

[2] A Rule of Two assessment sufficient to support a VA Competition restricted to VOSBs or to SDVOSBs often begins with a public "Source Sought" notice and questionnaire or with identification of potential SDVOSBs or VOSBs through an online search of the United States Small Business Administration's Small Business Dynamic Search (http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm, last visited August 7th, 2015). If such a database search were limited only to SDVOSBs, it would on August 7th, 2015 have returned 15,635 profiles. Once multiple SDVOSBs are identified, VA Contracting Officer Rule of Two assessments need only further establish that "there is a reason-

Consistent with FAR § 19.502-6(f), Congress did not qualify Section 8127(d) to limit Set-Asides to instances in which VOSB goals had not yet been met. Congress knew how to limit the Set-Aside mandate if it wanted to. Under 15 U.S.C. § 644(r) and its implementing Regulations, FAR §§ 19.502-4 & 16.505(b)-(2)(i)(F), Contracting Officers need not conduct a Rule of Two assessment before determining whether to set-aside Task or Delivery Orders to be placed under multiple-award Contracts, because in those instances the duty to set-aside Awards for Small Businesses is entirely discretionary. *Edmond Scientific Co.*, B-410-179, B-410179.2, November 12th, 2014, *2014 U.S. Comp. Gen. LEXIS 322, *15-*17.*[3]

Similarly, unlike the Rule of Two in FAR § 19.502-2(b) which is expressly inapplicable to purchases under the Federal Supply Schedules, FAR § 8.404(a),[4] Section 8127(d) provides no such exception.

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able expectation of receiving acceptably priced offers from small business concerns capable of performing the contract." *Starlight Corporation, Inc.*, B-410471.2, December 30th, 2014, *2014 U.S. Comp. Gen LEXIS 374, *9; *Adams & Associates, Inc. v. United States*, 109 Fed. Cl. 340, 357-358 (2013) ("All that is required is a reasonable expectation.").

[3] A multiple-award Contract is one issued to several prime Contractors through which supply requirements (Delivery Orders) or service requirements (Task Orders) are competed only among these several prime Contractors.

[4] Federal Supply Schedules are for varying quantities of commercial supplies or services and are awarded to multiple Contractors agreeing to provide volume pricing discounts. *Kingdomware*, 754 F.3d, at 925. Most are awarded by the United States General Services Administration ("GSA"); other Schedule

Section 8127(d) contains none of the exceptions typically found in other Federal Contracting Set-Aside laws and regulations. Instead, the only exception to the VA-specific Rule of Two in Section 8127(d) is the discretionary authority granted to VA Contracting Officers to award Contracts *directly* to VOSBs *without* a Competition. 38 U.S.C. § 8127(c). The Statute otherwise specifies no circumstances barring year-round application of these restricted Competition requirements—VA Contracting Officers "shall award" Contracts on the basis of Competitions restricted to SDVOSBs and VOSBs if the VA Contracting Officer has a "reasonable expectation" that: (1) two or more SDVOSBs or VOSBs will submit Offers, and (2) that "award can be made at a fair and reasonable price that offers the best value to the United States." 38 U.S.C. § 8127(d).

II. The Majority Below Misread Section 8127(d) And Failed To Give Effect To Congress's Mandate.

Consider these formulations:

> A well regulated Militia, being necessary to the security of a free state, the right of the

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Contracts for medical and nonperishable subsistence are awarded by the VA. The Rule of Two is by FAR §§ 8.404(a), 38.101(b) made inapplicable to GSA Federal Supply Schedules and made inapplicable to VA Schedule Contracts. *Walker Development & Trading Group*, B-411357, July 8th, 2015, 2015 U.S. Comp. Gen. LEXIS 190, *4.

> people to keep and bear Arms, will not be infringed.

Second Amendment to the Constitution.

> [F]or purposes of meeting the [VA's aspirational] goals [concerning the yearly percentage of VA Contracts awarded to SDVOSBs and VOSBs], and under this section, a contracting officer of the Department [VA] will award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States [the Rule of Two].

Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127(d).

Notice that the text of each of these snippets has a prefatory, or purpose, clause followed by an operative, or command, clause. This issue is whether this special instance of the Rule of Two is to be applied by VA Contracting Officers in all Acquisitions, this per the text of its unambiguous command clause ("shall award contracts on the basis of competition restricted"), or whether its command clause is rendered ambiguous by its purpose clause (the Rule of Two ap-

plies *only* as needed "for purposes of meeting the [VA's yearly aspirational] goals").

As explained in *District of Columbia v. Heller*, 554 U.S. 570, 576-580 (2008), statutory construction tenets demand that the text of a purpose clause (a well-regulated Militia being necessary) may not limit the text of a command clause (the right of the people to keep and bear Arms) unless the text of the command clause is itself ambiguous and there is a logical connection, a link, between the text of the purpose clause and the text of the ambiguous command clause. This Court relied on these statutory construction tenets in *Heller* to find a *Second Amendment* right to keep and bear Arms unconnected with militia service, and a right to use these Arms for self-defense within one's home—concluding there is no logical connection or mandatory link in the text of the *Second Amendment* between militia service and the right to keep and bear Arms.

The command clause of Section 8127(d) requiring VA Contracting Officers to conduct a Rule of Two assessment for every Acquisition is not itself overbroad or in need of limitation just to attainment of the VA's yearly aspirational goals. This is particularly so given that Small Business Set-Asides generally are not so limited. *See* FAR § 19.502-6(f).

The text of the purpose clause also is not logically connected or linked to the text of the command clause. Consistent with that position, Kingdomware stated at Oral Argument that if the clear mandate in

the text of the command clause is not ambiguous (it is not), then VA Contracting Officers must continue with Rule of Two assessments for Acquisitions even though VA's aspirational restricted Competition percentage goals for a particular Fiscal Year have already been met. This is simply the general rule of FAR § 19.502-6(f), a point which the Panel majority did not address. It does not ignore "additional statutory language that this mandate is for the purpose of meeting the goals under *subsection (a)*." *Kingdomware*, 754 F.3d, at 933.

Circuit Judge Reyna's dissent properly applied *Heller*:

> To override the clear imperative of *§ 8127-(d)*, the panel majority relies on the provision's prefatory language to reason that requiring a Rule of Two analysis in every VA procurement "makes the mandatory goal-setting statutory provision unnecessary." Maj. Op. at 19. Prefatory language is introductory and does nothing more than explain the general purpose for the Rule of Two mandate. The Supreme Court has noted, albeit in constitutional construction, that "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause" and that operative provisions should be given effect as operative provisions, and prologues as prologues. *District of Columbia v. Heller, 554 U.S. 570, 578 (2008)*. Here, the operative clause is that VA contracting offi-

> cers must award contracts on the basis of restricted competition if they have a reasonable expectation that the Rule of Two will be satisfied, a mandate that cannot be limited by its prologue.

Kingdomware, 754 F.3d, at 936-937. "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

The "ambiguity" in Section 8127(d)'s statutory mandate is nothing more than a proposition invented by the VA. There is no connection or link between purpose and command—just as with broad regulatory policy, this 38 U.S.C. § 8127(d) statutory mandate is in full force and effect throughout each Fiscal Year without regard to marketplace success or failure of the Rule of Two.

CONCLUSION

For those reasons stated by the Petitioner and in the forceful dissent in the Federal Circuit, this matter should be remanded with direction to enter Judgment for the Petitioner.

Respectfully submitted.

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Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR IRAQ AND AFGHANISTAN VETERANS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE 2006 VETERANS ACT SERVES A VITAL ROLE IN AIDING THE REINTEGRATION OF POST-9/11 VETERANS INTO SOCIETY 6

II. AN AGENCY MAY NOT INTERPRET A STATUTE TO FRUSTRATE CONGRESSIONAL INTENT 9

III. THE FEDERAL ACQUISITION REGULATION SYSTEM PROVIDES A FRAMEWORK TO IMPLEMENT THE MANDATORY PROVISIONS OF THE 2006 VETERANS ACT 13

A. The Federal Supply Schedule Supports Not Only Routine Orders, But Also Multi-Million-Dollar Procurements 14

B. The Federal Acquisition Regulation Provides a Tiered System of Increasing Process, Oversight, and Competition That the VA Can Use to Implement the 2006 Veterans Act 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984) 10, 3

Fire Risk Mgmt., Inc., B-411552, 2015 WL 4979628 (Aug. 21, 2015) 12

Glotech, Inc., B-406761; B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248 17

Gonzales v. Or., 546 U.S. 243 (2006) 10

Holloway & Co. v. United States, 87 Fed. Cl. 381 (2009) 18

Household Credit Services, Inc. v. Pfennig, 541 U.S. 232 (2004) 12

Labat–Anderson, Inc. v. United States, 50 Fed. Cl. 99 (2001) 18

LS3 Techs., Inc., B-407459, B-407459.2, Jan. 7, 2013, 2013 CPD ¶ 21 17

MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) 10, 11

STATUTES:

38 U.S.C. § 8127(a) 9

38 U.S.C. § 8127(d) ..... *passim*

47 U.S.C. ch. 5 10

TABLE OF AUTHORITIES—Continued

Page

47 U.S.C. § 203(a) 10

47 U.S.C. § 203(b) 10

Pub. L. 109-461, 120 Stat. 4303 (2006) 3

REGULATIONS:

48 C.F.R. pts. 1-53 5

48 C.F.R. § 1.101 19

48 C.F.R. § 2.101 ..... 19, 20

48 C.F.R. § 8.402(a) 3, 14

48 C.F.R. § 8.405 19

48 C.F.R. § 8.405-1 17

48 C.F.R. § 8.405-1(b) 19

48 C.F.R. § 8.405-1(c) 20

48 C.F.R. § 8.405-1(d)(3)(ii) 20

48 C.F.R. § 8.405-1(f) 16

48 C.F.R. § 8.405-2 17

48 C.F.R. § 8.405-2(c)(1) 19

48 C.F.R. § 8.405-2(c)(2) 20

48 C.F.R. § 8.405-2(c)(3) 20

48 C.F.R. § 8.405-2(c)(3)(iii)(b) 20

48 C.F.R. § 8.405-2(d) 20

TABLE OF AUTHORITIES—Continued

Page

48 C.F.R. § 8.405-2(f) 20

48 C.F.R. § 13.106-2(b)(1) 16

48 C.F.R. § 16.505(a)(4)(iii) 20

48 C.F.R. § 538.270(a) 14

48 C.F.R. § 552.238-75 14

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TABLE OF AUTHORITIES—Continued

Page

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U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS READJUSTING TO CIVILIAN LIFE (2014) 6

U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-590, FEDERAL SUPPLY SCHEDULES: MORE ATTENTION NEEDED TO COMPETITION AND PRICES (2015) 14, 15, 16

U.S. SMALL BUS. ADMIN., VETERAN-OWNED BUSINESSES AND THEIR OWNERS—DATA FROM THE CENSUS BUREAU'S SURVEY OF BUSINESS OWNERS (2012), *available at* http://www.sba.gov/sites/default/files/393tot.pdf 8

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TABLE OF AUTHORITIES—Continued

Page

VANESSA WILLIAMSON & ERIN MULHALL, IRAQ & AFG. VETERANS OF AM., ISSUE REPORT: CAREERS AFTER COMBAT (2009), *available at* http://media.iava.org/IAVA_careers_after_combat_2009.pdf 2, 7

INTEREST OF AMICUS CURIAE[1]

Established in June 2004, Iraq and Afghanistan Veterans of America (IAVA), a non-profit and non-partisan organization, is dedicated to improving the lives of Iraq and Afghanistan veterans and their families. IAVA is the nation's first and largest group dedicated to those military personnel who have served, and continue to serve, in the wars in Iraq and Afghanistan. To date, more than 2.8 million American troops have served in Iraq or Afghanistan, and hundreds of thousands of them have deployed multiple times during the more than decade-long period of conflict. IAVA focuses on critical issues facing veterans and their families, with a particular emphasis on issues facing new veterans. Its membership comprises active veterans and civilian supporters, totaling more than 175,000 members in all 50 states.

Programs encouraging participation by small businesses in government procurement fosters entrepreneurship, which IAVA believes is an important opportunity for veterans reentering civilian society after their military service. In a 2014 survey, 20 percent of IAVA member respondents reported plans to start a business. IRAQ & AFG. VETERANS OF AM., 2014 POLICY AGENDA § 5.3 (2014) (hereinafter 2014 POLICY AGENDA). Post-9/11 veterans starting or growing nascent businesses,

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[1] The parties have consented to the filing of this brief in blanket letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* or its counsel provided any monetary contribution to its preparation or submission.

however, report multiple challenges, including difficulty in obtaining startup capital, covering operating costs, and navigating complex state and federal regulations. *Id.* One of the six policy recommendations formulated by IAVA to assist with overcoming these challenges is to ensure that existing contracting preferences for veteran-owned small businesses are applied to the considerable volume of procurements awarded. *Id.* Thus, IAVA's interests are strongly aligned with Petitioner's.

SUMMARY OF ARGUMENT

After fighting far from home in the physically and psychologically punishing environment of Iraq and Afghanistan, reintegrating into civilian society is not easy. Often struggling with mental and physical health issues, post-9/11 veterans face more than their fair share of problems succeeding in a post-recession economic environment, as reflected by their stubbornly high unemployment rate. VANESSA WILLIAMSON & ERIN MULHALL, IRAQ & AFG. VETERANS OF AM., ISSUE REPORT: CAREERS AFTER COMBAT 4 (2009) (hereinafter IAVA, ISSUE REPORT) (noting an unemployment rate for former active duty personnel of 8.1 percent). Many post-9/11 veterans believe starting and managing a small business offers them, and the fellow veterans they employ, a way to reestablish roots in their communities and achieve financial and emotional stability.

The mission of the Department of Veterans Affairs (VA) is to serve these veterans, and the VA is an obvious choice among federal agencies to foster greater reliance on veteran-owned businesses for the vast array of products and services purchased by the

Federal government. Unfortunately, for years, the VA, as well as other federal agencies, has not always done its part to aid these businesses. To aid veteran entrepreneurship, Congress enacted Section 502 of the Veterans Benefits, Health Care, and Information Technology Act of 2006. Pub. L. No. 109-461, § 502, 120 Stat. 3403, 3431 (2006) (codified at 38 U.S.C. § 8127 (2012)) (hereinafter 2006 Veterans Act). This statute requires that the VA "shall" set aside contracts for veteran-owned small businesses whenever there is a reasonable expectation that two or more of these businesses can provide the needed good or services at a fair and reasonable price. *Id.* This mandatory directive is often referred to as the "Rule of Two." *See* Pet. Br. 37.

Notwithstanding the statute's unambiguous language directing the VA to reserve procurement opportunities for veteran-owned small businesses, a divided Federal Circuit panel validated the VA's position that it need not apply the 2006 Veterans Act's mandatory set-aside provision "as long as" the VA's contracting goals for those businesses are met. Pet. App. 20a. As a result, the Federal Circuit allowed the VA to continue ignoring the mandatory set-aside provision when making purchases under the auspices of the Federal Supply Schedule (FSS), Pet. App. 21a, a program designed for the streamlined federal procurement of commercial items and services, *see* 48 C.F.R. § 8.402(a) (2014). The VA now defends its position and the Federal Circuit's decision by arguing that the VA should be able to ignore the set-aside requirement if applying it to orders for basic off-the-shelf items, such as "griddles" and "slicers," would lead to administrative

inefficiency. Opp. 20, 23. Rather than require the VA to implement a clear rule enacted to prod the VA to do *more* than it historically had been willing to do, the court ruled the VA need only comply with the law if, in the VA's discretion, it was necessary to meet the VA's own fluid and self-determined "goals." Pet. App. 21a. The panel's ruling effectively allowed the VA to revert to the state of complacency it inhabited before passage of the 2006 Veterans Act.

The Federal Circuit erred. The VA's position is contrary to controlling precedent and inimical to the purposes of the 2006 Veterans Act. It also ignores the reality of today's FSS program. Although the FSS program may be used to buy the occasional "griddle," such one-off purchases account for only a tiny portion of the total VA FSS spend. The VA indisputably also uses the FSS program to conduct multimillion-dollar competitions for complex technology and services, as well as the vast majority of the government's pharmaceutical and medical device purchases. These FSS purchases total approximately 60 percent of the VA's annual procurement budget. VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). These acquisitions are not routine administrative "orders"; they are full-blown procurements no different than any other significant procurement conducted by the VA. If left to stand, the VA's current policy would allow it to continue diverting 60 percent of its procurement budget away from the very veterans whom the 2006 Veterans Act was intended to benefit.

The VA's decision to interpret the mandatory provisions of the 2006 Veterans Act as discretionary thus is unreasonable, arbitrary and capricious, and an abuse of discretion. Amicus agrees with Petitioner that § 8127(d) requires the VA to set aside procurements for veteran-owned small businesses whenever the Rule of Two is satisfied, and that the statute does not exempt FSS purchases. But, even if the statute allowed VA to create an exception for small or routine purchases under the FSS in the interest of administrative efficiency, the VA's broad carve-out of FSS contracts is still improper because it effects a radical and fundamental change in the statute.

The Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1–53, which governs all aspects of government procurement, provides a sliding scale of increasing process, oversight, and competition requirements as the dollar value of an FSS order increases. This existing framework provides thresholds from below $3,000, where little competition and paperwork is required, to $150,000 and more, where multiple steps must be taken to publicize the procurement and ensure that competition is maximized. Amicus's members, like the government itself, have a vested interest in ensuring that the VA's procurement function operates efficiently. But the VA appears not even to have considered whether the FAR's dollar-value thresholds might be leveraged to achieve a balance between the need for administrative efficiency, on one hand, and Congress's intent that procurements "shall" be set aside for veteran-owned small businesses, on the other.

Notwithstanding the existing spectrum of incremental alternatives, the VA ignored them all and instead implemented a policy that transformed the provisions of § 8127(d) from mandatory to discretionary. But agency discretion to implement a statute is not unfettered; it must be reasonable. And it is patently unreasonable to interpret a statutory directive in such a way as to effectively gut it.

ARGUMENT

I. THE 2006 VETERANS ACT SERVES A VITAL ROLE IN AIDING THE REINTEGRATION OF POST-9/11 VETERANS INTO SOCIETY.

In the next six years, over one million service members are expected to make the transition back to civilian life. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS READJUSTING TO CIVILIAN LIFE 1 (2014). The struggle to welcome home our veterans and reintegrate them into civilian society follows on the heels of every conflict. And the veterans of the Iraq and Afghanistan conflicts face unique challenges returning home. The effects of post-traumatic stress disorder and traumatic brain injury from recent conflicts are well documented. *Id.* at 11–14. Less well known, but often more widespread, are the economic challenges post-9/11 veterans face upon leaving the military. In the "largest nongovernmental survey of confirmed Iraq and Afghanistan combat veterans," members of Amicus list employment as their number one challenge in the transition into civilian life. IRAQ & AFG. VETERANS OF AM., 2014 IAVA MEMBER SURVEY 3, 21

(2014) (hereinafter 2014 IAVA MEMBER SURVEY). Such economic concerns far outweigh veterans' concerns about loss of military identity or even their own mental health. *Id.* at 21. Indeed, 64 percent of survey respondents reported difficulty paying their bills each month. *Id.* And 77 percent of respondents experienced a period of unemployment since leaving the military; 27 percent of those veterans were unemployed for over a year. *Id.* at 19.

In 2007, before the "Great Recession," the U.S. Department of Labor reported that veterans leaving active duty service experienced an 8.1 percent unemployment rate—at the time, nearly double the unemployment rate of those who had never served in the military. IAVA, ISSUE REPORT 4. Amicus member survey respondents recently reported an unemployment rate as high as 10%. 2014 IAVA MEMBER SURVEY 19. Post-9/11 veterans also experience a loss of earning power after military service. For those with college degrees, returning veterans earn on average $10,000 less annually than their non-military peers. *Id.* This has been attributed to a variety of causes, including social stigma and stereotyping, the difficulty of enforcing laws banning employment discrimination, and most often the difficulty veterans face explaining to employers how military experience translates to the civilian workforce. *Id.* at 2–5. This difficulty exists despite the fact that military service provides skills most employers should want: leadership, adaptability, and teamwork, among others.

The same qualities that make veterans valuable employees also make them natural entrepreneurs.

The U.S. Small Business Administration recognizes that "veteran business owners have gained important skills and leadership abilities from their active duty and Reserve Component service that are often directly relevant to business ownership." U.S. SMALL BUS. ADMIN., VETERAN-OWNED BUSINESSES AND THEIR OWNERS—DATA FROM THE CENSUS BUREAU'S SURVEY OF BUSINESS OWNERS 5 (2012). According to SBA statistics, veteran business owners are responsible for nearly one out of ten small businesses in America, and they employ nearly six million workers while generating over $1.2 trillion in receipts per year. *Id.* at 1. More importantly, veterans are 45 percent more likely than their non-veteran counterparts to be self-employed. *Id.* at 6.

And yet veteran entrepreneurs face significant challenges. Members of Amicus report difficulty raising startup capital, rising operating costs, and a confusing maze of state and federal regulations as barriers to entry for veteran entrepreneurs. 2014 POLICY AGENDA, *supra*, § 5.3. Those current and aspiring veteran business owners with service-connected disabilities face an even bleaker situation. Although nearly 7 percent of all veterans and non-veterans are self-employed, only 4 percent of service-disabled veterans are entrepreneurs. AMY G. COX & NANCY Y. MOORE, RAND CORP., IMPROVING FEDERAL AND DEPARTMENT OF DEFENSE USE OF SERVICE-DISABLED VETERAN-OWNED BUSINESSES 1 (2013).

Part of the problem veteran entrepreneurs have faced is the reluctance of federal agencies like the VA to meet their own goals for awarding federal contracts to veteran-owned small businesses. As the

Federal Circuit panel found, two earlier statutes designed to aid veteran-owned small businesses were ineffective because awards to such businesses were discretionary, and not mandatory. *See* Pet. App. 4a - 5a.

The 2006 Veterans Act, and the legislation that preceded it, was enacted to help veterans overcome these barriers, and hold the VA to greater accountability, by setting aside VA procurements for veteran-owned small businesses. Congress's stated intent in passing § 8127 was to "increase contracting opportunities for small business concerns owned and controlled by veterans and * * * by veterans with service-connected disabilities." 38 U.S.C. § 8127(a). Unfortunately, the VA has not maintained fidelity to Congress's intent.

II. AN AGENCY MAY NOT INTERPRET A STATUTE TO FRUSTRATE CONGRESSIONAL INTENT.

Petitioner explains that § 8127(d) unambiguously requires that the Rule of Two be applied to all VA procurements, including those conducted under the auspices of the FSS. Pet. Br. 44–45. Amicus agrees. However, even assuming there is room for interpretation somewhere in the 2006 Veterans Act's mandate, the VA still must interpret the Act in a reasonable manner consistent with Congress's intent. It has failed to do so. The VA's malleable interpretation of the word "shall" apparently means "whenever a VA contracting officer concludes that a particular procurement will help achieve the VA's small business goals." In practice, however, the VA's "whenever we feel like it" position exempts *all* FSS

procurements—representing roughly 60 percent of the VA's total procurement expenditures—from the requirements of the 2006 Veterans Act. That goes too far.

An agency is entitled to some deference when interpreting an ambiguous statute that it must implement and administer. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). An agency likewise is entitled to a certain amount of deference when interpreting its own regulations. *Gonzales v. Or.*, 546 U.S. 243, 255 (2006). In either case, however, the agency's interpretation must be reasonable. For example, an agency cannot interpret a statute to significantly expand its regulatory authority if doing so contravenes Congressional intent and the purpose of the statute. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994).

MCI, for example, addressed Section 203(a) of the Communications Act of 1934, 47 U.S.C. ch. 5, which provided that "*every* common carrier * * * shall * * * file" tariffs with the Federal Communications Commission (FCC). (Emphasis added.) 47 U.S.C. § 203(b) expressly authorized the FCC to "modify" the requirements of § 203(a). The FCC subsequently opted to "modify" § 203(a) by completely exempting non-dominant long distance carriers from the tariff filing requirement. *MCI Telecomm. Corp.*, 512 U.S. at 221–223. The FCC defended its position on the ground that it would promote more efficient telephone service. *Id.* at 233. This Court nevertheless rejected the FCC's interpretation,

concluding that it effected a "radical [and] fundamental change" to the law. *Id.* at 229, 234.

The same logic applies here, and then some. The 2006 Veterans Act does not even afford the VA the express authority to modify the mandatory set-aside requirement as was the case in *MCI*. Even if it did, a modification that makes a mandatory requirement a discretionary one—and thereby exempts the majority of FSS procurements from the Rule of Two—effects a "radical and fundamental change" in the statute.

In contrast to the VA's approach here, other agencies have implemented analogous mandatory requirements in such a way as to maintain efficiency while avoiding frustrating Congress's intent. For example, when implementing a law prohibiting the Defense Department from procuring certain "specialty metals" not melted or produced in the United States, then Secretary of Defense Melvin Laird issued a memorandum stating that it would be impracticable for the Defense Department to review *all* metals procured at the subcontract level and, therefore, the Department would not apply the law to purchases of specialty metals unless the acquisition was made for one of six specific types of defense products: aircraft, missile and space systems, ships, tanks, weapons, and ammunition. Memorandum from Melvin Laird, Sec'y of Defense, to Sec'ys of the Military Dep'ts & Dirs. of the Def. Agencies (Nov. 20, 1972), *available at* http://www.aia-aerospace.org/assets/berry-lairdmemo.pdf; *see* VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., RL33751, THE SPECIALTY METAL PROVISION AND THE BERRY AMENDMENT: ISSUES FOR CONGRESS 3–5

(2008). As the Secretary explained, the vast majority of specialty metals acquired by the Defense Department were incorporated into these six types of items; enforcing the domestic-sourcing requirement with respect to other, smaller procurements would be impractical and provide no significant benefit to domestic industry. *Id.*; Memorandum from Melvin Laird, *supra*.

The Defense Department's rule on specialty metals thus avoided impracticability by creating a narrow exception designed to have little or no impact on the intended beneficiaries. The VA here has done just the opposite. It has created a highly *impractical* "system" under which VA contracting officers must make a case-by-case determination whether to apply the Rule of Two based on the VA's progress against its set-aside goals, without even having access to the information they would need to track such progress.[2] Petitioner explains why this system is unworkable in practice. Pet. Br. 56–58. It is also at odds with this Court's jurisprudence, which favors agency interpretations that provide clear guidelines to agency personnel and public stakeholders over amorphous, case-by-case determinations that can prove unworkable in practice. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242–244 (2004) (observing that the Federal Reserve Board's bright-

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[2] The VA's recent track record suggests it would benefit from a clear rule. *See Fire Risk Mgmt., Inc.*, B-411552, 2015 WL 4979628 (Aug. 21, 2015) (finding the VA failed to exercise "informed business judgment" when concluding that two service-disabled veteran-owned small businesses were not available to compete for an architect/engineer contract).

line rule of what constitutes a "finance charge" avoids an approach that "would prove unworkable to creditors and, more importantly, lead to significant confusion for consumers"); *Chevron*, 467 U.S. at 857, 866 (affirming the EPA's "bright-line" definition of a "stationary source"). And as we next explain, the VA similarly could have fashioned a bright-line, fair, and practical policy to implement the 2006 Veterans Act through notice and comment rulemaking. It just failed to do so.

III. THE FEDERAL ACQUISITION REGULATION SYSTEM PROVIDES A FRAMEWORK TO IMPLEMENT THE MANDATORY PROVISIONS OF THE 2006 VETERANS ACT.

The Federal Circuit accepted the government's contention that even though the statute states that the VA "shall" restrict competition to veteran-owned small businesses whenever the Rule of Two is met, following the statute's plain meaning would force the VA to subject routine purchases for "griddles" and "slicers" to an overly complex procurement process. Pet. App. 18a; *see* Opp. 20. The panel thus set up a choice: either completely exempt the VA from the statute's requirements for FSS purchases or grind the VA's procurement process to a halt. That is a false choice; there were and are multiple incremental options available to the VA that would not burden it at all when purchasing "griddles and slicers." And those incremental options already are embedded in the regulations governing the FSS program.

A. The Federal Supply Schedule Supports Not Only Routine Orders, But Also Multi-Million-Dollar Procurements.

The FSS program was established to allow government agencies to easily obtain commercial products and services at pre-negotiated, favorable prices with minimum administrative burden. *See, e.g.*, 48 C.F.R. § 8.402(a) (2014).[3] This program has proven popular with federal agencies. In 2014, the government spent approximately $33.1 billion on purchases off the FSS schedules. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-590, FEDERAL SUPPLY SCHEDULES: MORE ATTENTION NEEDED TO COMPETITION AND PRICES 1 (2015) (hereinafter GAO REPORT, GAO-15-590). The VA is a significant user of the FSS program, acknowledging allocations of upwards of 60 percent of its acquisition funds toward FSS purchases in the past. VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009).

Although originally established to simplify rudimentary purchases, *see* Opp. 12, the FSS program has become something much more. Now, a vast majority of expenditures made against FSS contracts do *not* involve basic products. A mere *one-half of one percent* of FSS obligations in 2014 was

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[3] GSA and VA FSS contracts require the schedule-holder to track commercial pricing and discounting practices (and adjust schedule prices accordingly) to ensure government customers always receive the best possible deal. *See* 48 C.F.R. §§ 538.270(a), 552.238-75. This is known as "most favored customer" pricing. *Id.* § 538.270(a).

spent on items such as office supplies, whereas three service categories accounted for 70 percent (or $18 billion) of the overall expenditures. GAO REPORT, GAO-15-590, at 8.[4] Indeed, some of the government's most significant acquisitions take place through the FSS program.

In a July 2015 report, for example, GAO noted that although the FSS Program can be used to "procure relatively simple items * * * our sample also included large and complex procurements—for example, a $123M order for web-based human resources information system, a $91M order for in-person consumer support services, and a $66M order for enterprise-level technology support." *Id.* GAO did not dismiss these examples as outliers. *See id.* To the contrary, it suggested that use of the FSS program to award large contracts has become common practice. Between 2010 and 2014, the following acquisitions (among others not cited) were awarded using the FSS process:

- $20 million order for communications support and infrastructure in Kuwait and Afghanistan;

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[4] GAO found that 38 percent ($9.8 billion) was spent on professional, management and administrative support services; 20 percent ($5.1 billion) on information technology and telecommunication services; and 12 percent ($3.1 billion) on information technology products, such as equipment, software, and supplies. GAO REPORT, GAO-15-590, at 8. The procurement in this case involves information technology services, the second-highest category of expenditures. Pet. App. 50a.

- $20 million order for technical and professional information technology services;
- $123 million order for web-based human resources solution by the VA;
- $90 million order associated with the Affordable Care Act;
- $91 million order for in-person consumer support services; and
- $66 million order for enterprise-level technology support.

Id. at 8, 13, 16–17. These "orders" are actually complicated procurements that involve considerable acquisition planning, detailed solicitations and statements of work, and a competitive process comparable to any other government procurement.

Not surprisingly, when buying complex services and high-volume or high-value products, agencies routinely apply procedures well beyond those used when buying a small number of low-cost products. Indeed, as shown later, they are *required* to do so as the dollar value of an FSS order increases. These purchases are not simple orders; they are full-fledged procurements that trigger regulatory guidance specifically promulgated to govern such acquisitions.[5] For example, agencies prepare detailed Requests for Quotations (RFQs) that include exhaustive technical

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[5] The FAR grants contracting officers the discretion to augment any simple acquisition with requirements from the other FAR sections governing more involved acquisitions. *See* 48 C.F.R. §§ 8.405-1(f), 13.106-2(b)(1) (2014).

specifications and pricing guidance. These RFQs include rigorous technical evaluation and price/technical tradeoff criteria designed to assure that minimum technical requirements are met and that the ordering agencies receive the best value possible. And they afford offerors who take the time to prepare lengthy and complicated proposals with procedural protections, including the ability to challenge the agencies' award decisions.[6]

Moreover, when the government purchases tailored services, such as many information technology services, or high value or a high volume of products (even if the product is itself "basic"), it is required to apply processes and procedures that add time and complexity, regardless of whether the purchase is made through the FSS program or the open market.[7] 48 C.F.R. §§ 8.405-1, 8.405-2. Put another way, if the VA were purchasing a few supplies for a single VA office it might well just pick up the phone and place an order with an FSS contract holder. In contrast, if it were buying thousands of supplies to use in every VA office in the country, it could not use

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[6] *See, e.g., Glotech, Inc.*, B-406761; B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248. This $900 million VA procurement under the FSS contained requirements for thirty-eight categories of infrastructure, information technology systems, and "cross-cutting activities" that would be evaluated on a "best value basis, considering price and six non-price factors." *Id.* at 2. Such a process, even on an FSS "order," resembles that found in most complex open-market federal procurements.

[7] An "open market" purchase is any federal procurement, or portion of a procurement, awarded outside of the FSS program. *See, e.g., LS3 Techs., Inc.*, B-407459, B-407459.2, Jan. 7, 2013, 2013 CPD ¶ 21 at 9.

that same approach; it would have to follow more rigorous procedures. The VA's argument that it must treat all FSS purchases equally, and therefore must make § 8127(d) equally inapplicable to the entire FSS program, thus ignores existing rules that distinguish between routine orders and larger, more complex procurements.

In practice, then, the difference between open-market and FSS acquisitions has become progressively blurred.[8] The United States' arguments are premised on an antiquated characterization of the FSS program. And the VA was not justified in fashioning its policy to exempt the *entirety* of its purchase under FSS program. It could easily have avoided that unreasonable "all-or-nothing" approach by leveraging the FAR's existing tiered administrative structure, which thoughtfully calibrates the competing priorities of administrative convenience and compliance with procurement statutes and regulations.

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[8] *See Holloway & Co. v. United States*, 87 Fed. Cl. 381, 393–394 (2009) ("The distinction between when 'the more formal and rigorous procedures for negotiated procurements' * * * are required, and when they are not, has to do with the nature of the procurement."); *Labat–Anderson, Inc. v. United States*, 50 Fed. Cl. 99, 103–104 (2001) (holding that when making an FSS purchase, if the agency also incorporates procedures akin to negotiated open market procurements, the agency's procurement decision will be reviewed according to the more rigorous standards that govern such procurements).

B. The Federal Acquisition Regulation Provides a Tiered System of Increasing Process, Oversight, and Competition That the VA Can Use to Implement the 2006 Veterans Act.

The FAR does not proscribe a "one-size fits-all" process for agency procurements. There are many procurement types, and as many rules to meet varying needs associated with each. *See* 48 C.F.R. § 1.101 (2014). FAR Subpart 8.4, which is relevant here, outlines the procedures that agencies (and other eligible entities) must follow when making purchases using the FSS program. *See* 48 C.F.R. § 8.405 (2014).

As reflected in the following examples, there is a "ratcheting-up" of mandatory procurement process requirements (some dictated by statute) as the procurement becomes more complex and the dollar value of the purchase increases:

- The "micro-purchase threshold" ($3,000).[9] Agencies seeking to purchase below this threshold are not required to compete micro-purchases nor are they required to publicize them. Agencies may place these orders with any FSS contractor that can meet the agency's needs; no formal evaluation of technical specifications is required. 48 C.F.R. §§ 8.405-1(b), 8.405-2(c)(1) (2014).

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[9] The micro-purchase threshold is $3,000 for most purchases; in limited circumstances, other values may apply. 48 C.F.R. § 2.101 (2014).

- Purchases between $3,000 and $150,000[10] (the micro-purchase and "simplified acquisition" thresholds, respectively). 48 C.F.R. § 2.101. In this range, agencies are required to solicit quotes from at least three available sources, gradually increasing the level of competition and oversight in the process. 48 C.F.R. 8.405-1(c), 8.405-2(c)(2) (2014). Acquisitions valued above $25,000 must be summarized, or "synopsized," on a public-facing government-wide website. 48 C.F.R. § 16.505(a)(4)(iii) (2014).

- Acquisitions expected to exceed $150,000 (the "simplified acquisition threshold"). At this threshold, procedural requirements become more intense. Agencies must develop an RFQ or a Request for Proposals that describes the nature of the government's needs. 48 C.F.R. § 8.405-2(c)(3). An agency must provide the solicitation to as many schedule contractors as practicable. 48 C.F.R. §§ 8.405-1(d)(3)(ii), 8.405-2(c)(3)(iii)(b) (2014). The agency must evaluate responses for "best value," 48 C.F.R. § 8.405-2(d) (2014), and document more details of the evaluation process, 48 C.F.R. § 8.405-2(f) (2014).

Agencies placing larger orders under FSS contracts thus already are required to use procedures not unlike those used in any other type of government

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[10] The simplified acquisition threshold is $150,000 for most procurements; in limited circumstances, other values may apply. 48 C.F.R. § 2.101 (2014).

procurement. And because the ordering process for these larger orders is practically indistinguishable from those used on non-FSS procurements, the VA's position about applying the Rule of Two to FSS purchases unravels. The VA has stubbornly maintained that the mandatory provisions of the 2006 Veterans Act do not apply whenever it decides to use the FSS to purchase goods and services. But given the FAR framework, the VA had no supportable reason for adopting its "all or none" approach.

* * *

The VA's "all or none" approach significantly diminished the effect of a statute intended to benefit our veterans. And even assuming the VA had the authority under the 2006 Veterans Act to change a "shall" into a "may," the VA had alternatives readily available to it that would have preserved the Act's intended benefits while permitting the VA to design regulations allowing it to efficiently make truly routine purchases. The VA's interpretation should be set aside.

CONCLUSION

For all of the foregoing reasons, and those in Petitioner's brief, this Court should reverse the Federal Circuit's judgment.

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KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* STEVEN J. KOPRINCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Circuit erred by construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE VA'S LITIGATING POSITION WILL LEAD TO UNINTENDED RESULTS AT ODDS WITH CONGRESS' WILL 5

II. THE GOVERNMENT'S POSITION IGNORES THE LONG HISTORY OF "RULES OF TWO" AND SMALL BUSINESS GOALS 14

III. THE GOVERNMENT'S POSITION IS UNNECESSARY TO MEET THE VA'S STATED AIM 25

IV. THE VA'S CURRENT INTERPRETATION OF SECTION 8127 IS NOT ENTITLED TO DEFERENCE 29

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Aldevra, B-405271 *et al.*,
2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) . . . *passim*

Aldevra, B-406205,
2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) . 30, 31, 32

Am. Tobacco Co. v. Patterson,
456 U.S. 63, 102 S. Ct. 1534 (1982) 14

Brown v. Georgetown Hosp.,
488 U.S. 204, 109 S. Ct. 468 (1988) 32

Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.,
467 U.S. 837, 104 S. Ct. 2778 (1984) . 5, 29

Contract Mgmt., Inc. v. Rumsfeld,
291 F Supp. 2d 1166 (D. Haw. 2003) . 20, 21

Crosstown Courier Serv., Inc.,
B-406336, 2012 CPD ¶ 146 (Comp. Gen. Apr. 23, 2012) . . 28

DGR Assocs., Inc. v. United States,
94 Fed. Cl. 189 (2010) 17

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120, 120 S. Ct. 1291 (2000) 6

Goodyear Atomic Corp. v. Miller,
486 U.S. 174, 108 S. Ct. 1704 (1988) . 15

J.H. Rutter Rex Mfg. Co. v. United States,
706 F.2d 702 (5th Cir. 1983) 15, 19, 16, 18

J.H. Rutter Rex Mfg. Co., Inc. v. United States,
534 F. Supp. 331 (E.D. La. 1982) 19

Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter,
135 S. Ct. 1970 (2015) 14

Kingdomware Tech., Inc. v. United States,
754 F.3d 923 (Fed. Cir. 2012) . 3

Library Sys. & Servs. / Internet Sys., Inc.,
B-244432, 91-2 CPD ¶ 337 (Comp. Gen. Oct. 16, 1991) 20

Norwich & N.Y Transp. Co. v. Wright,
80 U.S. 104 (1871) . 25

Powerex Corp. v. Reliant Energy Servs., Inc.,
551 U.S. 224, 127 S. Ct. 2411 (2007) 9

Skinner & Eddy Corp. v. United States,
249 U.S. 557, 39 S. Ct. 375 (1919) . 14

United States v. Am. Trucking Ass'ns., Inc.,
310 U.S. 534, 60 S. Ct. 1059 (1940) 25

STATUTES, LAWS, AND REGULATIONS

13 C.F.R. § 124.103(b) (2013) ... 10

13 C.F.R. § 126.200 (2013) 11

15 U.S.C. § 637(a)(1)(D) (2014) 18

15 U.S.C. § 637(m)(2) (2014) . . 18

15 U.S.C. § 644(a) 22

15 U.S.C. § 644(g) 12, 13

15 U.S.C. § 644(g)(1)(A) (2014) 17, 18

15 U.S.C. § 644(g)(1)(A)(ii) (2014) . 7

15 U.S.C. § 657a(b)(2)(B) (2010) 17

15 U.S.C. § 657f(b) (2012) 18

38 U.S.C. § 8127 *passim*

38 U.S.C. § 8127(a)(1) (2012) 6

38 U.S.C. § 8127(b) . . 7

38 U.S.C § 8127(c) . 8, 35

38 U.S.C. § 8127(d) *passim*

38 U.S.C. § 8127(d) (2012) . 3

38 U.S.C. § 8127(i) . 10

38 U.S.C. § 8127(i)(1)–(2) . . . 11

48 C.F.R. § 2.101 . . . 7

48 C.F.R. § 8.404(a) (2013) 27

48 C.F.R. § 8.405-1 (2013) 27

48 C.F.R. § 8.405-1d) 27

48 C.F.R. § 8.405-5(a)(1) (2013) 27, 28

48 C.F.R. §§ 13.000-13.501 (2015) (FAR Part 13) . 26, 27

48 C.F.R. §§ 14.000-14.105 (2014) (FAR Part 14) . 26

48 C.F.R. §§ 15.000-15.609 (2014) (FAR Part 15) . . . 26

48 C.F.R. § 19.14 11

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FAR Part 8 34

FAR 8.404 34

FAR 8.404(a) 29

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INTEREST OF *AMICUS CURIAE*[1]

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Koprince is the author of *The Small-Business Guide to Government Contracts* (AMACOM Books 2012), which provides small government contractors with a "plain English" overview of key compliance issues in federal contracting. Koprince also writes and edits the blog *SmallGovCon*[2] where he and his colleagues have published more than 600 articles on government contracting legal matters, of interest to small contractors. Koprince's articles on federal contracting have appeared in many other industry and legal publications, including the *Public Contract Law Journal*, *The Federal Lawyer*, *The Procurement Lawyer*, *Law360*, *Set-Aside Alert*, and *Contract Management Magazine*.

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[1] Counsel for the parties have consented to the filing of this brief, and their consents have been lodged with the Clerk of the Court. No counsel for a party authored any portion of this brief, and no person other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Available at* http://www.smallgovcon.com.

Koprince is a regular speaker at government contracting conferences, including the 2014 National Veterans Small Business Engagement, a conference for service-disabled veteran-owned small businesses ("SDVOSBs") and veteran-owned small businesses, ("VOSBs") sponsored by the U.S. Department of Veterans Affairs. Koprince is often asked to comment on legal developments in government contracting, and has been quoted by the *Washington Post*, *Fox Business News*, *NBC News*, *Bloomberg BNA*, and other news outlets. Koprince is a regular guest on Federal News Radio, a Washington, DC-based radio station devoted to coverage of federal government matters. Koprince is a graduate of Duke University and the Marshall-Wythe School of Law at the College of William & Mary.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006[3] (the "VA Act"), the bill's chief sponsor in the House of Representatives had this to say:

> I want to make it plain that the intent of this bill is to put veteran-owned businesses, especially service-disabled veteran-owned businesses, at the front of the line for set aside opportunities at the Department of Veterans Affairs. This is a small way for the nation to show its appreciation for not only the service these men and women have rendered to the

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[3] Pub. L. 109-461, 120 Stat. 3403 (2006) (codified throughout 38 U.S.C.).

> nation, but also for their entrepreneurial spirit that drives our economy.

152 CONG. REC. H5,646 (daily ed. July 24, 2006) (statement of Hon. John Boozman).

Notwithstanding Congress' unambiguous intent, the Government now demands that veteran-owned businesses move to the back of the line. The Government claims that the veteran-owned business preferences set forth in the VA Act apply only if the VA has not met its internal goals for contracting with veteran-owned concerns. The Government's position not only harms the very veterans the VA is sworn to serve, but contradicts the language and intent of the VA Act.[4]

Viewed in context, the Government's position not only would require the VA to discontinue contracting preferences for veteran-owned businesses whenever the VA meets its goals, but would require the VA to prioritize *non-veteran* businesses over those owned by veterans. In fact, the VA would be required to prioritize certain non-veteran businesses even when the VA's goals for those categories of businesses were met. For this reason, the Government's position would place

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[4] This brief does not address matters that were fully explored by the dissenting judge in the underlying case. *See Kingdomware Tech., Inc. v. United States*, 754 F.3d 923 (Fed. Cir. 2012) (Reyna, J., dissenting). Amicus specifically concurs with the dissent that: (1) the VA Act clearly and unambiguously commands the VA to perform a "Rule of Two" analysis without regard to whether the VA's goals have been met; and (2) the phrase "for purposes of meeting the goals under subsection (a)" is prefatory, and does not vary the operative clause of 38 U.S.C. § 8127(d).

veteran-owned firms at a severe disadvantage in contracting with the VA—the exact opposite of the result Congress intended.

The Government's position also ignores the long history of government set-aside preferences for small businesses. The "Rule of Two" set forth in the VA Act is but the latest iteration of a small business preference mechanism that has existed since 1958. Small business preferences (including a mandatory "Rule of Two") were in place long before government-wide small business contracting goals were first established in 1988.

Historically, these goals have been a yardstick by which to measure the Government's success (or lack thereof) in using various tools, including the Rule of Two, to contract with small businesses. The goals serve an information-gathering function, but do not determine whether agencies must continue to use tools like the Rule of Two. In the one limited instance where Congress *did* tie achievement of goals to the use or non-use of a small business preference, Congress was explicit about the link between the goals and the preference. Had Congress intended to include such a link in the VA Act, Congress would have explicitly established that link using its prior legislation as a guide.

The Government's interpretation of the VA Act is also unnecessary to achieve the VA's stated aim. The Government suggests that the VA must make an "either/or" choice between applying veterans' preferences, on the one hand, and using the Federal Supply Schedule ("FSS"), on the other. Not so. Under statutory authority adopted in 2010, the VA may do

both by applying veterans' preferences to orders issued under the FSS. The VA's failure to adopt this obvious solution reveals that the true purpose behind the VA's anti-veteran interpretation of the VA Act is not to use the FSS, but to establish the broad ability to circumvent veteran-owned contractors in all manner of procurements.

Finally, the VA's interpretation of the VA Act is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) or similar authority. The VA's interpretation was developed in the course of litigation, and not in the exercise of the VA's rulemaking authority. In fact, the VA's own notice-and-comment rulemaking and regulations implementing the VA Act indicate that the VA believes the VA Act's veteran preferences to be mandatory.

ARGUMENT

I. THE VA'S LITIGATING POSITION WILL LEAD TO UNINTENDED RESULTS AT ODDS WITH CONGRESS' WILL

The sponsor of the House bill that became Section 8127[5] was unequivocal—the new law was intended to "put veteran-owned businesses, especially service-disabled veteran-owned businesses, at the front of the line for set aside opportunities at the Department of Veterans Affairs." 152 CONG. REC. H5,646 (daily ed. July 24, 2006 (statement of Hon. John Boozman); *see*

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[5] The VA Act's veteran-owned contracting preferences are set forth in 38 U.S.C. section 8127. For ease of reference, this section is referred to as "Section 8127" throughout this amicus brief.

also H.R. REP. NO. 109-592 at 12 (2006) (H.R. 3082 would, among other things, "[p]rovide veteran and service-disabled, veteran-owned small business priority in VA contracting as well as priority among other 'set-aside' groups eligible for preferential treatment under the Small Business Act"). But under the Government's interpretation of the law, the VA would be required to *prioritize non-veteran small businesses* whenever the VA meets its veteran-owned goals. In other words, if the Government has its way, veteran-owned businesses will be forced to the back of the line.

At the Court of Federal Claims and again at the Federal Circuit, discussion of Section 8127 focused on two subsections: Subsection (a), which directs the VA to establish internal goals for veteran-owned contracting, and Subsection (d), which establishes the "Rule of Two." These two subsections, however, should not be read in a vacuum, but rather as a part of a unified whole consisting of all twelve subsections that comprise Section 8127. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000) (a court must interpret a statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole"). Reading Section 8127 as a whole, it is evident that the Government's position would lead to results contrary to the will of Congress.

Subsection (a) directs the VA to establish goals for each fiscal year for contracting with SDVOSBs and VOSBs. *See* 38 U.S.C. § 8127(a)(1) (2012). The "goal for a fiscal year for participation under paragraph 1(B) shall be not less than the Government-wide goal for that fiscal year for participation by [SDVOSBs.]" *Id.*

Under current law, the Government-wide goal is that SDVOSBs receive no less than three percent of the total value of all prime contract awards. *See* 15 U.S.C. § 644(g)(1)(A)(ii) (2014). Thus, Subsection (a) directs the VA to establish an internal goal of no less than three percent of the total value of its prime contract awards.

Subsection (b) provides that the VA may make sole source awards of "certain small contracts" below the simplified acquisition threshold.[6] Subsection (b) reads:

> (b) Use of non-competitive procedures for certain small contracts.—*For purposes of meeting the goals under subsection (a)*, and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

38 U.S.C. § 8127(b) (emphasis added).

Subsection (c) allows sole source contracts to SDVOSBs and VOSBs in amounts up to $5 million. Subsection(c) states:

> (c) Sole source contracts for contracts above simplified acquisition threshold.—*For purposes of meeting the goals under subsection (a)*, and in accordance with this section, a contracting

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[6] The simplified acquisition threshold is currently $150,000 for most acquisitions. 48 C.F.R. § 2.101.

> officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if –
>
> (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
>
> (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,0000; and
>
> (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(c) (emphasis added).

Finally, subsection (d) provides the "Rule of Two":

> (d) Use of restricted competition.—Except as provided in subsections (b) and (c), *for purposes of meeting the goals under subsection (a)*, and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award

> can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(d) (emphasis added).

Thus, subsection (d) is one of three subsections providing different mechanisms for the VA to award contracts to veteran-owned companies. All three subsections include an identical prefatory phrase: "for purposes of meeting the goals under subsection (a)." If this phrase means, as the Government argues, that the Rule of Two under Subsection (d) becomes ineffective whenever the VA meets its goals, the sole source mechanisms provided in Subsections (b) and (c) must also become ineffective upon the VA's satisfaction of its goals because these subsections contain the same prefatory phrase. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 2417 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

If subsections (b), (c), and (d) become ineffective whenever the VA meets its veteran-owned goals, the VA will be forced to prioritize certain non-veteran small businesses. Subsection (i) sets forth an "order of priority" for the VA's award of contracts to small businesses:

> (i) Priority for contracting preferences—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:
>
> (1) *Contracts awarded pursuant to subsection (b), (c), or (d)* to small business concerns owned

> and controlled by veterans with service-connected disabilities.
>
> (2) *Contracts awarded pursuant to subsection (b), (c), or (d)* to small business concerns owned and controlled by veterans that are not covered by paragraph (1).
>
> (3) Contracts awarded pursuant to—
>
> (A) section 8(A) of the Small Business Act (15 U.S.C. 637(a)); or
>
> (B) section 31 of such Act (15 U.S.C. 657a).
>
> (4) Contracts awarded pursuant to any other small business contracting preference.

38 U.S.C. § 8127(i) (emphasis added).

In this way, Section 8127(i) establishes a defined order of preference for VA small business procurements. SDVOSBs are to be given the highest priority, followed by veteran-owned small businesses ("VOSBs"). The third-highest priority is for participants in the U.S. Small Business Administration's 8(a) Business Development Program ("8(a) Program") and Historically Underutilized Business Zone ("HUBZone") program.[7] After these four categories of small

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[7] The 8(a) Business Development Program is an SBA-run program for small businesses owned and controlled by socially and economically disadvantaged individuals. *See generally* 13 C.F.R. pt. 124. Under the 8(a) Program's regulations, members of certain ethnic groups are presumed to be socially disadvantaged; veterans (including service-disabled veterans) are afforded no such presumption. *See* 13 C.F.R. § 124.103(b) (2013).

businesses, the VA may award small business contracts using "any other small business contracting preference." The FAR establishes three "other small business preferences": contracts with women-owned small businesses ("WOSBs"), *see* 48 C.F.R. § 19.1505 (2014); contracts with SDVOSBs under separate authority applicable to most other agencies, *see id.* §§ 19.1405–19.1406; and contracts with all small businesses—that is, SDVOSBs, 8(a) Program Participants, HUBZone Program Participants, WOSBs, and all other small businesses, *id.* § 19.1502.

By its plain language, the priority afforded SDVOSBs and VOSBs only applies to "[c]ontracts awarded pursuant to subsection (b), (c), or (d)." 38 U.S.C. § 8127(i)(1)–(2). If these subsections become ineffective whenever the VA meets its goals, as the Government's argument assumes, there can be no contracts awarded "pursuant to subsections (b), (c), or (d)." And if no contracts are awarded under these three subsections, participants in the 8(a) Program and HUBZone Program must be given the highest priority in VA small business contracting. Only after prioritizing 8(a) Program and HUBZone Program participants would the VA be entitled to set aside a contract for SDVOSBs, using the separate, government-wide authority under FAR subpart 19.14. *See* 48 C.F.R. § 19.14. SDVOSBs would be (at best)

Section 31 of the Small Business Act establishes the Historically Underutilized Business Zone ("HUBZone") program, which offers preferences to small businesses located in economically disadvantaged parts of the country. *See generally* 13 C.F.R. pt. 126. Veteran ownership (or lack thereof) is not a consideration for HUBZone status. *See* 13 C.F.R. § 126.200 (2013).

third in line for VA small business contracts, with no greater right to those contracts than WOSBs or "ordinary" small businesses. VOSBs would fare even worse because there is no "other small business contracting preference" in the FAR pursuant to which the VA can set aside a contract for VOSBs.

The illogic of the Government's position is magnified by the fact that the statutory preferences for 8(a) Program and HUBZone Program participants are *not* affected by whether the VA meets its contracting goals for those programs. The Small Business Act establishes government-wide goals of five percent for Small Disadvantaged Businesses (a category including 8(a) Program participants) and three percent for HUBZone Program participants. *See* 15 U.S.C. § 644(g). The VA exceeded its five percent goal for small disadvantaged businesses (including 8(a) Program participants) in every completed fiscal year after the VA Act was enacted. In fiscal years 2007 through 2014, the VA's awards to small disadvantaged businesses totaled 8.77%, 7.97%, 7.97%, 8.27%, 8.78%, 7.91%, and 7.92%, respectively. *See* Small Business Procurement Scorecards, SMALL BUS. ADMIN. (providing annual PDF scorecards going back to 2006).[8] The VA also met its HUBZone goals in fiscal year 2007 *See id.*

If Congress' intent was that the VA "move on" to the next-in-line subcategory of small business whenever a certain goal was met, Congress would have specified, in subsection (i), that 8(a) Program and HUBZone

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[8] *Available at* https://www.sba.gov/content/small-business-procurement-scorecards-0 (last visited Aug. 13, 2015).

Program participants would only receive their respective priorities so long as the VA failed to meet its goals for those programs. But Congress included no language even arguably imposing such a restriction anywhere in subsection (i) or elsewhere in Section 8127 [9] In fact, the legislative history of the VA Act confirms that Congress' intent was just the opposite. *See* H.R. REP. NO. 109-592, at 12 (Section 8127 would "[p]rovide veteran and service-disabled, veteran-owned small business priority in VA contracting as well as priority among other 'set-aside' groups eligible for preferential treatment under the Small Business Act").

Taken to its logical conclusion, the Government's position is that Congress intended that, when the VA meets its veteran-owned goals: (1) the VA Act's veteran-owned preferences become ineffective; (2) 8(a) and HUBZone small businesses are prioritized; (3) unlike the preferences afforded veteran-owned firms, the preferences afforded 8(a) and HUBZone firms remain effective even if (as has been the case for SDBs for seven consecutive fiscal years) the VA met its goals for those programs; and (4) VOSBs would be entitled to no procurement preferences at all (other than those afforded all small businesses).

Section 8127 was intended to move veteran-owned companies to the "front of the line" for VA procurements. H.R. REP. NO. 109-592 at 14-15 ("[T]he

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[9] If Congress intended the phrase "for purposes of meeting the goals" in the manner the VA advances, Congress likely would have included a phrase such as "for purposes of meeting the goals under 15 U.S.C. § 644(g)" in establishing priorities for 8(a) Program and HUBZone Program participants under subsection (i).

Committee believes that small businesses owned and controlled by veterans and service-disabled veterans should *routinely be granted the primary opportunity* to enter into VA procurement contracts " (emphasis added)). The Government's position subverts this purpose, by putting 8(a) Program and HUBZone Program participants at the front and kicking SDVOSBs and VOSBs to the rear. Plainly, this cannot be the result Congress intended. *See, e.g.*, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015) (rejecting argument that "would lead to strange results that Congress is unlikely to have wanted"); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S. Ct. 1534, 1538 (1982) (noting "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 569, 39 S. Ct. 375, 379 (1919) ("Only compelling language could cause us to impute to Congress the intention to produce results so absurd . . . .").

II. THE GOVERNMENT'S POSITION IGNORES THE LONG HISTORY OF "RULES OF TWO" AND SMALL BUSINESS GOALS

The Government would have the Court believe that the "Rule of Two" and goal-setting provisions of Section 8127 were novel inventions, without any relevant history that might shed light on Congress' intent. Far from it.

In order to encourage contracting with small businesses, the Government has used set aside requirements similar to the VA Act's "Rule of Two"

since 1958; actual "rules of two" have been a part of the contracting landscape since 1979. These set aside preferences were in effect long before the Government first adopted a small business goals system in 1978 and a government-wide goals system in 1988. Since their creation, these goals have served an information-gathering function; agencies must continue to apply the set aside rules regardless of whether they meet their goals. Congress was presumably well-aware of this longstanding history when it adopted the VA Act. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85, 108 S. Ct. 1704, 1712 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Congress was also presumably well-aware of the one very limited instance in which it *did* establish a link between agencies' goals and the use of set aside preferences—and did so in painstakingly explicit terms.

The Small Business Act provided that the Government should ensure that a "fair proportion" of government contracts be awarded to small businesses. *See* Small Bus. Act of 1958, Pub. L. 85-536, § 2, 72 Stat. 384, 384 (1958). The Department of Defense ("DoD") subsequently adopted regulations specifying that certain procurements would be "set aside for the exclusive participation of small business concerns." *J.H. Rutter Rex Mfg. Co. v. United States*, 706 F.2d 702, 705 (5th Cir. 1983). The DoD's regulations provided that such set asides would occur if "(i) offers will be obtained from a significant number of responsible small business concerns and (ii) awards will be made at reasonable prices." *Id.* In 1979, the DoD amended subpart (i) to require set asides when offers were reasonably expected from "at least two responsible

small business concerns." *Id.* In this way, the first "rule of two" was born.

When the DoD's procurement regulations were merged into the new FAR, the rule of two moved into the FAR, as well. Today, the FAR's small business rule of two is very similar to the DoD's 1979 regulation:

> The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that—(1) Offers will be obtained from at least two responsible small business concerns .; and (2) Award will be made at fair market prices.

48 C.F.R. § 19.502-2(b) (2014).[10]

The FAR's small business rule of two is a regulatory creation to implement the Small Business Act's command that small businesses receive a "fair proportion" of government contracts. *See* Small Bus. Act § 2, 72 Stat. at 384. But although the rule of two began with a regulation, Congress subsequently modeled several statutory provisions on the regulatory rule of two.

Congress created the HUBZone Program in the Small Business Reauthorization Act of 1997. *See* Pub. L. 105-135, §§ 601–07, 111 Stat. 2592, 2627–36 (1997).

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[10] Separate authority requires the contracting officer to set aside acquisitions between $3,000 and $150,000 for small businesses "unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery." *Id.* § 19.502-2(a).

The statute required agencies to set aside contracts for HUBZone Program participants when a "rule of two" was met:

> Notwithstanding any other provision of law a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price .

Id. § 31, 111 Stat. at 2629.[11]

In the Veterans Benefits Act of 2003, Congress gave agencies the authority to restrict competitions to SDVOSBs provided that a "rule of two" was satisfied:

> In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and

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[11] In 2010, the Federal Circuit held that this statute required agencies to set aside contracts for HUBZone Program participants whenever the "rule of two" was satisfied. *See DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010). Congress then amended the statute to make the rule discretionary instead of mandatory. *See* 15 U.S.C. § 657a(b)(2)(B) (2010); 48 C.F.R. § 19.1305(b) (2014).

> that the award can be made at a fair market price.

Pub. L. 108-183, § 36, 117 Stat. 2651, 2663 (2003); *see also* 15 U.S.C. § 657f(b) (2012); 48 C.F.R. § 19.1405(b) (2014).

Congress has established similar "rules of two" for 8(a) Program Participants and WOSBs. *See* 15 U.S.C. §§ 637(a)(1)(D), 637(m)(2) (2014). All five of these "rules of two"—small business, HUBZone, 8(a), SDVOSB, and WOSB—were in effect when Congress adopted the VA Act.[12]

As Congress was establishing various "rules of two," it also adopted several goals statutes. "[I]n 1978, Congress amended [the Small Business Act] to require the head of each federal agency to establish goals for the participation of small business concerns in the procurement of contracts of more than $10,000." *J.H. Rutter Rex Mfg.*, 706 F.2d at 706. In 1988, Congress adopted a government-wide small business goals requirement. *See* Bus. Opp. Dev. Reform Act of 1988, Pub. L. 100-656, § 502, 102 Stat. 3853, 3881 (1988).

The initial 20% small business goal was subsequently increased to 23%, and statutory goals for small disadvantaged businesses (5%), HUBZone Program Participants (3%), SDVOSBs (3%), and WOSBs (3%) were added. *See* 15 U.S.C. § 644(g)(1)(A)

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[12] A sixth "rule of two" is set out in the regulations of the Bureau of Indian Affairs and requires that the BIA set aside acquisitions for Indian Economic Enterprises ("IEEs"). *See* 48 C.F.R. § 1480.504-1 (2013). There are no statutory or regulatory goals for IEE contracting.

(2014). All five goals were in effect when the VA Act was adopted. None of the five goals had anything to do with whether an agency was required to apply any of the "rules of two."

The Fifth Circuit has held that an agency's success in meeting its goals (or lack thereof) does not affect the agency's obligation to apply the small business rule of two. In *J.H. Rutter Rex Manufacturing*, the appellant (a large business) argued that the small business rule of two impermissibly limited competition for federal contracts. The appellant contended, in part, that the small business goals created additional pressure on agencies to award contracts to small businesses. Rejecting the appellant's argument, the Fifth Circuit wrote:

> Finally, we briefly consider the appellant's challenge to the goal practices of the government. The goals are not the creation of the administrative agencies but are a specific direction of Congress. We concur with the district court that "[t]he goals do not determine which contracts will be set aside; the goals set are sometimes not attained. Their function is rather to gauge the effectiveness of the small business program."

J.H. Rutter Rex Mfg., 706 F.2d at 711-12 (quoting *J.H. Rutter Rex Mfg. Co., Inc. v. United States*, 534 F. Supp. 331, 340 (E.D. La. 1982) (citations omitted).[13]

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[13] In a further discussion of the effect of the small business goals, the Fifth Circuit wrote that "the goals do not as a matter of law have any impact on set aside decisions." *Id.* at 705.

Interpreting the small business "rule of two," the U.S. Government Accountability Office ("GAO") has rejected the very argument that the Government makes here: namely, that an agency's success in meeting its goal renders a set aside requirement ineffective. In *Library Systems & Services/Internet Systems, Inc.*, B-244432, 91-2 CPD ¶ 337 (Comp. Gen. Oct. 16, 1991), a small business challenged the decision of the Department of Labor ("DOL") to issue a solicitation on an unrestricted basis. The protester contended that the solicitation should have been set aside for small businesses pursuant to the "rule of two" set forth in FAR 19.502-2(b). The DOL defended the protest by arguing, *inter alia*, that it need not apply the rule of two because "it has exceeded its small business goals[.]" *Library Sys. & Servs.*, B-244432 at 3.

GAO rejected the DOL's position and sustained the protest, writing that the FAR "specifically prohibits DOL from declining to set aside this acquisition based on the agency's history of meeting its set aside goals." *Id.* at 4. The FAR provides, in relevant part:

> None of the following is, in itself, sufficient cause for not setting aside an acquisition:
>
> (a) A large percentage of previous contracts for the required item(s) has been placed with small business concerns.

48 C.F.R. § 19.502-6.

The United States District Court for the District of Hawaii reached a similar conclusion in *Contract Management, Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Haw. 2003). In that case, the plaintiff challenged the then-mandatory set aside preference for HUBZone

Program participants, arguing, in part, that mandatory HUBZone set asides were inconsistent with a low three percent goal. Disagreeing with this contention, the court wrote that the HUBZone goals "are minimum targets rather than caps." *Id.* at 1175. The court concluded "[i]f the HUBZone Program becomes so successful that it threatens the ability of other small businesses to meet their goals, Congress is free to amend the statute." *Id.* at 1176.

In sum, when Congress passed the VA Act, it presumably was aware that: (1) mandatory small business set aside preferences have been in effect since 1958 and a mandatory "rule of two" since 1979; (2) the set aside preferences long predate the adoption of small business goals; (3) courts and GAO have held that an agency's achievement of its goals does not permit the agency to avoid the small business preference; (4) Congress itself has adopted discretionary "rules of two" for 8(a) Program participants, HUBZone Program participants, SDVOSBs and WOSBs; and (5) none of these "rules of two" are linked to an agency's achievement (or lack thereof) of its goals. Given its presumed knowledge of this legislation and history, Congress would have been explicit had it intended to condition the application of Section 8127(d)'s "Rule of Two" upon the VA's failure to meet its goals under subsection (a).

This is exactly what Congress did in 1988, when it created a limited test program called the Small Business Competitiveness Demonstration Program ("CompDemo" Program). The CompDemo Program was intended to "provide for the testing of innovative procurement methods and procedures." Bus. Opp. Dev.

Reform Act of 1988, Pub. L. 100-656, § 711(a), 102 Stat. 3853, 3889 (1988).

The CompDemo Program designated four industries (construction (excluding dredging); refuse systems and related services; architectural and engineering services (including surveying and mapping); and non-nuclear ship repair), then required agencies to set very high "enhanced goals" for small business awards in these four industries: "[e]ach participating agency shall establish an annual small business participation goal that is 40 percent of the dollar value of the contract awards for each of the designated industry groups." *Id.* § 712(a), 102 Stat. at 3890.

The CompDemo Program required the participating agencies to track achievement of their goals on a quarterly basis. *See id.* § 712(d)(1), 102 Stat. at 3891. Agencies were to issue solicitations on an unrestricted basis "if the participating agency has attained its small business participation goal" of forty percent. *Id.* § 713(a), 102 Stat. at 3892. However, if the agency failed to attain its forty percent goal, it was required to set aside its solicitations for small business:

> RESTRICTED COMPETITION.—If a participating agency has failed to attain its small business participation goal under section 712(a), subsequent contracting opportunities, which are in excess of the reserve thresholds specified pursuant to section 712(b) shall be solicited through a competition restricted to eligible small business concerns pursuant to section 15(a) of the Small Business Act (15 U.S.C. 644(a)) to the extent necessary for such agency to attain its goal. Such modifications in the participating

> agency's solicitation practices shall be made as soon as practicable, but not later than the beginning of the quarter following completion of the review made pursuant to [the quarterly review] indicating that changes to solicitation practices are required. Such participating agency shall [issue unrestricted solicitations] upon determining that its contract awards to small business concerns meet the required goals.

Id. § 713(b), 102 Stat. at 3892.

The CompDemo statute left nothing to chance. It unambiguously provided that the set aside preferences would be required "[i]f a participating agency has failed to attain" its goals. *Id.* The statute also answered obvious practical questions about how and when contracting officers were to determine whether the set-aside requirements were "on" or "off."

As the CompDemo statute demonstrates, Congress knows how to explicitly draw a link between an agency's achievement of its goals and the use of a set aside preference. In sharp contrast to the CompDemo statute, Section 8127 includes no explicit link between the VA's goals and the "Rule of Two." Unlike in the CompDemo statute, Congress has not stated that the set aside preferences become ineffective if the VA attains its goals, nor has Congress addressed how and when contracting officers would determine whether the Rule of Two applies to a particular solicitation.

The CompDemo statute also indicates that Congress realized that it was breaking from longstanding practice by establishing a cause/effect relationship between an agency's goals and the small business set

aside preferences. The CompDemo program itself was a "test" program intended to be effective only for a limited period of time.[14] *Id.* § 711(c), 102 Stat. at 3890. And even within the already-narrow confines of its test, Congress narrowly tailored the CompDemo program to apply only to certain industries, and even then only when an agency had achieved a specific "enhanced" goal set forth in the statute. The goal, in turn, was lofty: forty percent, or double the twenty percent government-wide goal then in effect.

Section 8127 is no "test." It broadly applies to all VA acquisitions, not a limited subset of industries. The specific goal is not set by Congress, but left to the VA's discretion—and may be as low as the three percent government-wide goal.

Had Congress intended to deviate from longstanding practice regarding how agencies use goals, it likely would have acted cautiously and deliberately, as was the case with the CompDemo program. Moreover, Congress likely would have identified a specific "enhanced" veteran-owned goal for the VA to meet before the Rule of Two became ineffective, rather than allowing the VA to avoid the veteran preferences merely by meeting the government-wide goal.

Congress did not act in a vacuum when it adopted Section 8127 Rather, Section 8127 was just the latest in a long series of statutory and regulatory small

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[14] The CompDemo program was originally intended to be conducted over a four-year period. The program was later extended, but eventually was repealed by the Small Business Jobs Act of 2010. Pub. L. 111-240, § 1335, 124 Stat. 2505, 2543 (2010).

business preferences and goal-setting. Aware of the history and pertinent law, Congress undoubtedly intended Section 8127 to act like the other laws in this field: with no "cause/effect" relationship between the VA's aspirational goals, on the one hand, and mandatory set aside requirements, on the other. *See, e.g., Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. 104, 120 (1871) ("[T]he act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction."); *see also United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 544, 60 S. Ct. 1059, 1064 (1940) ("A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'").

III. THE GOVERNMENT'S POSITION IS UNNECESSARY TO MEET THE VA'S STATED AIM

The Government suggests that its interpretation of Section 8127 is necessary to enable the VA to use the FSS to procure goods and services. The Government's position is, at best, outdated. Under statutory authority adopted in 2010, the VA can prioritize veteran-owned businesses when it uses the FSS. The VA's failure to apply this 2010 authority suggests that the VA's true purpose is not to use the FSS for administrative convenience, but to avoid contracting with veteran-owned small businesses whenever the VA so desires.

By way of background, the Government buys goods and services in many different ways. For example, for certain services (often construction) the Government may use a traditional sealed bidding process. This

process, which is set forth under FAR Part 14, *see* 48 C.F.R. §§ 14.000–14.105 (2014), calls for contractors to submit their bids by a particular date and time; the bids are then publicly opened and read aloud to determine the winner. For other contracting actions, the Government may engage in "contracting by negotiation," under FAR Part 15, *see id.* §§ 15.000–15.609, in which the Government may engage in discussions with offerors and allow revised proposals. Under FAR Part 13, certain less-costly, less-complex goods and services may be procured using a streamlined set of rules known as the Simplified Acquisition Procedures. *See id.* §§ 13.000–13.501.

Another way the Government buys goods and services is through the FSS. The FSS is a Government-wide vehicle under which the General Services Administration ("GSA") establishes long-term contracts with multiple contractors to provide a variety of goods and services. *See GSA Schedule*, U.S. GEN. SERVS. ADMIN.[15] Each FSS contract is awarded to multiple vendors, all of whom will offer similar products or services. *Id.* For example, offerors under Schedule 03FAC provide Facilities Maintenance and Management, whereas offerors under Schedule 71 provide Furniture. *See Schedule List*, U.S. GEN. SERVS. ADMIN.[16] A benefit of the FSS is its relative ease and administrative convenience.

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[15] *Available at* http://gsa.federalschedules.com/gsa-schedule/ (last visited Aug. 17, 2015).

[16] *Available at* http://www.gsaelibrary.gsa.gov/ElibMain/scheduleList.do (last visited Aug. 17, 2015).

Individual contractors negotiate their underlying FSS contracts with the GSA. *See GSA Schedule, supra.* Once a contractor receives an FSS contract, the contractor is "On Schedule," and is authorized to sell the particular products or services available under that particular FSS contract. The receipt of an FSS contract does not mean that the contractor will successfully sell products or services to the Government; the FSS contract is merely a "hunting license" that enables the contractor to be among those considered for FSS purchases under a particular Schedule. *Id.*

When an agency wishes to procure goods or services using the FSS, the agency places an "order" against the contractor's Schedule contract. Different levels of competition are required depending on the value of the acquisition. *See* 48 C.F.R. § 8.405-1 (2013). For orders exceeding the simplified acquisition threshold (currently $150,000 for most goods and services), the ordering agency must compete the order among multiple Schedule holders. *See id.* § 8.405-1(d).

If an agency buys goods or services using the FSS, the agency is not required to follow the ordinary small business set-aside procedures set forth in FAR Part 19. *See id.* § 8.404(a) ("[FAR] Parts 13 14, 15, and 19 do not apply to [Blanket Purchase Agreements] or orders placed against Federal Supply Schedules Contracts[.]"). However, pursuant to the Small Business Jobs Act of 2010, agencies are permitted, as a matter of discretion, to set aside FSS orders for small businesses, SDVOSBs, 8(a) Program participants, HUBZone Program participants, and WOSBs. *See* Pub. L. 111-240, § 1331, 124 Stat. 2505, 2541 (2010); *see also* 48 C.F.R. § 8.405-5(a)(1) (2013) (reflecting same).

In this case, the Government suggests that the VA must choose, in each procurement, between using the FSS, on the one hand, and conducting a set aside for veteran-owned companies, on the other. This is simply not so.

When the VA Act was adopted, Schedule orders could not be set aside for small businesses or socioeconomic subcategories of small businesses. Indeed, in its rulemaking implementing the VA Act, the VA wrote that it "has no authority to include [SDVOSB and VOSB] set-aside procedures for FSS orders under this rule" because "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders." VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 74 Fed. Reg. 64624 (Dec. 8, 2009).

That changed in 2010 with the enactment of the Small Business Jobs Act. The VA can now achieve the aim it says it seeks—use of the FSS—while fully complying with Section 8127 by setting aside FSS orders for SDVOSBs.[17] 48 C.F.R. § 8.405-5(a)(1). The VA's refusal to apply this authority demonstrates that the VA's true aim is not merely to use the FSS, but to use it to avoid the preferences established in Section 8127—for all types of procurements.

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[17] GAO has held that it is permissible under Section 8127(d) for the VA to conduct market research among FSS vendors to determine whether there are two or more FSS vendors capable of meeting a requirement. *See Crosstown Courier Serv., Inc.*, B-406336, 2012 CPD ¶ 146 (Comp. Gen. Apr. 23, 2012). But if the market research reveals that there are not at least two SDVOSB FSS vendors reasonably expected to submit offers at fair and reasonable prices, the VA cannot proceed with an FSS acquisition. *See id.*

IV. THE VA'S CURRENT INTERPRETATION OF SECTION 8127 IS NOT ENTITLED TO DEFERENCE

The Government may contend that the VA's interpretation of the VA Act is entitled to so-called *Chevron* deference. But no deference is owed the VA's interpretation, which was developed in the midst of litigation when the VA's original interpretation was rejected by GAO. The VA's current interpretation (that is, that the veteran preferences in Subsection (d) become ineffective whenever the VA meets its goals in Subsection (a)) is not reflected in the VA's notice-and-comment rulemaking, regulations, or any other setting in which the VA exercises its rulemaking function.

In *Aldevra*, B-405271 *et al.*, 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"), GAO considered an SDVOSB's challenge to the VA's decision to procure products using the FSS without first determining whether two or more SDVOSBs could be reasonably expected to submit offers.

Opposing the protest, the VA argued that FSS procurements—and FSS procurements alone—were exempt from the statutory Rule of Two. The VA's argument rested on FAR 8.404(a) and a comment in the VA's rulemaking adopting its SDVOSB and VOSB set-aside regulations, in which the VA had stated that the Rule of Two "does not apply to FSS task or delivery orders." *Id.* at 4 (citing VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 74 Fed. Reg. 64625 (Dec. 8, 2009)).

The VA's litigation position in *Aldevra I*, and in "several other protests currently pending" at the time,

was much different than it is now: the VA limited its argument to its contention that it could use the FSS in lieu of using the "Rule of Two" to determine if a SDVOSB or VOSB set aside was required. GAO rebuffed the VA's argument, and found that:

> [T]he exception in the FAR that permits agencies to award task and delivery orders under the FSS without required to government-wide small business programs—including the SDVOSB set-aside program created by the 2003 statute (and implemented by FAR subpart 19.14)—does not govern, or apply to, the SDVOSB set-aside program created by the Veterans Benefits, Health Care, and Information Technology Act of 2006.

Id.

Following this loss,[18] the VA modified its legal argument in subsequent cases. In *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"), the VA faced a similar protest by the same SDVOSB. This time, the VA tried a new argument: that the prefatory language "for purpose of meeting the goals under subsection (a))" should be interpreted to mean "that the VA may consider its current

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[18] Though the VA lost *Aldevra I*, it refused to implement GAO's recommendation; such refusals are rare. In fiscal year 2014, for example, GAO sustained 72 protests; in only one of those 72 cases did the responsible agency refuse to implement GAO's recommendation. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-256SP, *GAO Bid Protest Report to Congress for Fiscal Year 2014* (Nov. 18, 2014), *available at* http://gao.gov/products/GAO-15-256SP.

achievements vis-à-vis attaining the Secretary's SDVOSB/VOSB contracting goals in deciding to do restricted competitions." *Id.* at 4–5.

GAO noted that the VA had not previously made this argument, despite multiple opportunities to do so:

> [A]lthough the agency has defended numerous protests before our Office involving precisely this issue, this is the first time that the agency has raised these arguments. Thus, until this protest, the agency had not suggested that the phrase "for purposes of meeting the goals under subsection (a)" as it appears in 38 U.S.C. § 8127(d) grants the agency discretion to decide that in some procurements the mandate in the statute will apply, and in other procurements it will not.

Id. at 5.[19]

The VA's goal-based interpretation advanced in *Aldevra II* is much broader than the agency's own initial position. In *Aldevra I*, the VA argued that it could disregard the Rule of Two when, in an appropriate case, it decides to procure goods and services using the FSS. It expanded its position considerably in *Aldvera II*, by asserting that it may disregard the statutory preferences entirely whenever the agency's own internal goals are met. *Id.* at 4-5

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[19] GAO rejected the VA's goal-based argument, writing that the prefatory phrase "explains the purpose for the mandate, which is to meet the goals established under subsection (a); however, the phrase does not create an exception to the mandate." *Id.*

(noting the incongruity in the arguments advanced by the VA).

The VA's new position is a marked expansion: it covers all forms of procurements (sealed bids, negotiated contracts, simplified acquisitions, and so on. It also covers the many items that cannot be purchased from the FSS—most notably, construction services. With its network of hospitals and other facilities, the VA has requested almost $1.7 billion in new budgetary authority in its 2016 budget for construction projects alone. *See* DEPT. OF VETERANS AFFAIRS, FY 2016 Budget Submission, Budget in Brief, vol. 4 p. 1-1.[20] Under the argument the VA advanced in *Aldevra I*, these contracts would be subject to the Rule of Two. Under the broad new interpretation the VA developed for *Aldevra II* (and that the Government advances in this Court), veterans would be afforded no preferences for these (or any other) VA contracts, unless the VA failed to meet its goals.

The VA's broad new position was developed in the course of litigation when the agency's initial position failed to persuade GAO. As a product of litigation, the position is not entitled to deference. *See, e.g.*, *Brown v. Georgetown Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 474 (1988) ("deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate").

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[20] *Available at* http://www.va.gov/budget/docs/summary/Fy2016-VolumeIV-ConstructionLongRangeCapitalPlanAndAppendix.pdf (last visited Aug. 17, 2015).

The VA's notice-and-comment rulemakings make no mention of a link between the Rule of Two and the VA's achievement of its goals. On August 20, 2008, the VA issued a proposed rule to implement portions of the VA Act, including Section 8127 In the proposed rule, the VA stated that the VA Act had created a "unique procurement program among Federal Agencies." VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 73 Fed. Reg. 49142 (Aug. 20, 2008). Under this new program, "[t]he law requires the Secretary to give priority to a small business concern owned and controlled by veterans." *Id.*

The VA stated that its proposed rule would:

> Require set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States.

Id.

The VA issued a final rule on December 8, 2009. *See* VA Acquisition Regulation: Supporting VOSBs and SDVOSBs, 74 Fed. Reg. 64619 (Dec. 8, 2009). In the final rule, the VA noted that "[s]ince the effective date of section 8127, VA has met its SDVOSB and VOSB goals as established by the Secretary of Veterans Affairs." *Id.* at 64623. The VA could have, at this time, explained that because it reached its goals, the Rule of Two was ineffective, the VA did not do so. But instead, the VA reiterated that under the contracting program created by the VA Act "VA is required to give priority

in contracting to small businesses owned and controlled by veterans . ." *Id.* at 64622.

The only exception from the Rule of Two identified in the VA's rulemakings was for FSS contracts. In a statement foreshadowing its position in *Aldevra I*, the VA cited FAR 8.404 and wrote that "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR . which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Id.* at 64624.

Once again, the VA could have stated that it was free to award contracts under the FSS (or any other vehicle) whenever its internal SDVOSB and VOSB goals are met. But it did not.

As suggested by the 2008 and 2009 rulemakings, the procurement regulations the VA adopted to implement the VA Act broadly mandate the use of the Rule of Two—and say nothing about the VA's goals. The VA Acquisition Regulation ("VAAR") provides, in relevant part:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

48 C.F.R. § 819.7005(a) (2009).

The VAAR only provides three exceptions to the set-aside mandate; none of the exceptions have anything to do with the FSS or the VA's internal goals. Instead, the three regulations, *see id.* §§ 813.106, 819.7007, 819.7008, authorize VA contracting officers to award sole source contracts to SDVOSBs and VOSBs under certain circumstances. These exceptions are mandated by the VA Act, which permits the VA to award sole source contracts to SDVOSBs and VOSBs. *See* 38 U.S.C. § 8127(c).

The VAAR is clear and unambiguous—the Rule of Two must be followed unless an SDVOSB or VOSB sole source award is appropriate. The Government's position in this Court is at odds with the VA's own regulations.

CONCLUSION

Congress passed the VA Act to require the VA to prioritize veteran-owned firms in contracting. The plain language of Section 8127(d), the statutory context, and longstanding history of similar laws all confirm that Congress did not intend to allow the VA to wriggle out of its special relationship with the heroes it serves merely because the VA achieves a veteran-owned contracting goal as low as three percent.

If the VA wishes to use the FSS as a matter of administrative convenience, it may take advantage of the special set aside authority authorized by the Small Business Jobs Act of 2010, and apply veteran-owned

preferences to its FSS orders. But if the VA simply wishes to tell veteran-owned firms to move to the back of the contracting line, it should not be able to do so. It is up to this Court to instruct the VA that it must put veterans first.

Respectfully submitted.

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Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Federal Circuit's Interpretation of the 2006 Veterans Act Undermines Congress's Clear Goal of Maximizing Business Opportunities for Veterans and Returns the VA to the Prior Discretionary Statutory Regime Congress Explicitly Rejected 5

A. The History of Congress's Legislation in This Area Demonstrates That Congress Intended the Veterans Rule of Two to Be Mandatory for All VA Contracts. 6

B. Congress Enacted the 2006 Veterans Act in Recognition of the Unique Challenges Faced by VOSBs and SDVOSBs 12

C. A Mandatory Veterans Rule of Two Analysis Does Not Strip the VA of All Discretion, Nor Does It Impose a Substantial Burden. 14

II. The Federal Circuit's Opinion Creates an Untenable Situation As It Is Impossible for Either the VA or Those with Whom the VA Contracts to Know When VOSB and SDVOSB Goals Are Met. 17

A. It Is Impossible for the VA or Those with Whom It Contracts to Determine When the Statutory Goals of § 8127(a) Are Met in a Given Fiscal Year. 18

B. Congress Knows How to Draft Legislation Where Mandatory Procurement Requirements Expire When an Agency Meets Certain Goals—and the Veterans Act Does Not Contain Any of the Hallmarks of Such Legislation. 21

CONCLUSION 23

ADDENDUM

TABLE OF AUTHORITIES

CASES

Eldred v. Ashcroft, 537 U.S. 186 (2003) 14

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 12

LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 16

Res-Care, Inc. v. United States, 735 F.3d 1384 (Fed. Cir. 2013) 15

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 14

STATUTES

15 U.S.C. § 637(d) 6

15 U.S.C. § 644(g)(1)(A)(i) 18

15 U.S.C. § 644(g)(1)(A)(ii) 18

15 U.S.C. § 657f(b) 8, 10

38 U.S.C. § 8127(a) 9

38 U.S.C. § 8127(d) 4, 10, 15

Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 ..... 21, 22

Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 8

Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 ..... 7, 8

LEGISLATIVE MATERIALS

152 Cong. Rec. 23,515 (2006) 15

A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 109th Cong. (2006) 7

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H.R. Rep. No. 106-206, pt. 1 (1999) 7

H.R. Rep. No. 109-592 (2006) 7, 8, 9, 10, 11, 13, 15

The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs, 108th Cong. (2003) 8

OTHER AUTHORITIES

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48 C.F.R. § 4.604(c) 19

48 C.F.R. § 19.202-5(b) 19

48 C.F.R. § 19.502-2 16

48 C.F.R. § 813.106 17

48 C.F.R. § 819.7007 17

48 C.F.R. § 819.7008 17

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Federal Procurement Data System, https://www.fpds.gov 19

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U.S. Dep't of Veterans Affairs, *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp (last visited Aug. 24, 2015) 9

INTEREST OF *AMICI CURIAE*[1]

Amici are all Members of the United States House of Representatives and United States Senate, some of whom were members of the 109th Congress, which passed the 2006 Veterans Act—the statute at issue in this case—and all of whom share an interest in ensuring that this Court is aware of Congress's steadfast commitment to supporting the nation's veterans and small businesses.[2] *Amici* are members of congressional committees dedicated to setting national policies that assist and promote small businesses, veterans, and the armed forces.

Amici include Senator John Boozman, who was instrumental in obtaining passage of the 2006 Veterans Act. In 2006, then-Representative Boozman was a member of the House Committee on Veterans' Affairs and Chairman of the Subcommittee on Economic Opportunity, which spearheaded the effort to ensure that veteran-owned small businesses would be first in line to compete for government contracts.

Then-Representative Boozman was the sponsor of the 2006 Veterans Act. He is joined on this brief by one of the Veterans Act's co-sponsors, Representative

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and their written consents are on file with the Clerk of the Court.

[2] A complete list of *amici* Members of Congress is attached hereto in the Addendum.

Susan Davis, who now serves on the House Armed Services Committee.

Senator Boozman is currently a member of the Senate Committee on Veterans' Affairs, as are *amici* Senator Jon Tester and Senator Jerry Moran. Like Senator Boozman, Senator Moran was also a member of the 2006 House Veterans Affairs Committee.

Amici also include Representative Jeff Miller, who is currently Chairman of the House Committee on Veterans' Affairs and was a member of that Committee in 2006; as well as Representative Corrine Brown, who was also a member of the Committee in 2006 and is currently the Ranking Member. Additional *amici* who are currently members of the House Committee on Veterans' Affairs include Vice Chairman Gus Bilirakis, Representative Mike Coffman (Chairman of the Subcommittee on Oversight and Investigations), Representative Ann M. Kuster (Ranking Member of the Subcommittee on Oversight and Investigations), Representative Mike Bost, Representative Ryan A. Costello, Representative Doug Lamborn, Representative Aumua Amata Coleman Radewagen, Representative Phil Roe, and Representative Jackie Walorski. *Amici* also include Representative Bill Johnson, a veteran and former member of the House Veterans' Affairs Committee. As the former Chairman of the Subcommittee on Oversight and Investigations, Representative Johnson held two hearings in 2011 on the Department of Veterans Affairs' implementation of the 2006 Veterans Act.

Amici from the House Committee on Small Business include Chairman Steve Chabot and Ranking

Member Nydia M. Velázquez. They also include: Representative Richard L. Hanna (Chairman of the Subcommittee on Contracting and the Workforce), Representative Mark Takai (Ranking Member of the Subcommittee on Contracting and the Workforce), Representative Judy Chu, Representative Chris Gibson, Representative Janice Hahn, Representative Cresent Hardy, Representative Steve Knight, Representative Brenda L. Lawrence, Representative Grace Meng, and Representative Seth Moulton.

Amici also include a number of our nation's veterans who went on to serve in Congress, such as Senator John McCain, Chairman of the Senate Armed Services Committee.

SUMMARY OF THE ARGUMENT

The United States Congress recognizes the tremendous debt of gratitude we owe our men and women in uniform and their families for all that they have done for our country. Congress likewise recognizes that the transition from military back to civilian life is not always easy, and that this country needs to do all it can to support the men and women who have already given so much to their country. Over the years, Congress has passed a series of acts to help veterans with this transition, including legislation designed to increase veteran-owned small businesses' ("VOSBs") and service-disabled veteran-owned small businesses' ("SDVOSBs") access to government contracts. Helping veterans in this particular way also comports with Congress's steadfast commitment to supporting our country's small businesses.

As the agency specifically charged with assisting veterans, the Department of Veterans Affairs ("VA") bears a special responsibility to VOSBs and SDVOSBs. Yet, Congress observed that the VA's track record of awarding contracts to VOSBs and SDVOSBs fell far short of what it should have been. Thus, in 2006 Congress passed the Veterans Act to increase the award of government contracts to VOSBs and SDVOSBs by the VA. Unlike its predecessor statutes, which gave government agencies a great deal of discretion when awarding contracts, the 2006 Veterans Act expressly *limited* the VA's discretion by requiring that the VA set aside contract awards for VOSBs or SDVOSBs whenever it determined that there were at least two responsible VOSBs and SDVOSBs capable of fulfilling the contract at fair market prices. *See* 38 U.S.C. § 8127(d). This "Veterans Rule of Two," which is modeled on the mandatory small business "Rule of Two" for all federal contracts, ensures that VOSBs and SDVOSBs will be at the front of the line for virtually *all* VA contracts for which they can compete. To protect the government from paying more than it should, the Veterans Rule of Two allows for competition to be extended beyond VOSBs or SDVOSBs where two qualifying offers cannot be found at a fair price.

The Federal Circuit's decision below completely misunderstands what Congress was attempting to accomplish when it passed the 2006 Veterans Act. By holding that the Act does not always require the VA to conduct a Veterans Rule of Two analysis, the Federal Circuit actually *increased* the VA's discretion when awarding contracts, when too much agency discretion

was the very problem that prompted Congress to pass the Act in the first place. The Federal Circuit's conclusion was based on significantly flawed reasoning that ignores the fundamental goals of the 2006 Veterans Act, 38 U.S.C. § 8127 *et seq.*, to maximize the opportunities for veterans in recognition of the unique hardships they face in the marketplace, and to address the failures of prior discretionary legislation.

For the reasons set forth below, this Court should reverse the Federal Circuit and hold—as Congress intended—that the VA must employ the Veterans Rule of Two in awarding contracts whenever the requirements of § 8127(d) are satisfied.

ARGUMENT

I. The Federal Circuit's Interpretation of the 2006 Veterans Act Undermines Congress's Clear Goal of Maximizing Business Opportunities for Veterans and Returns the VA to the Prior Discretionary Statutory Regime Congress Explicitly Rejected.

In enacting the 2006 Veterans Act, Congress wanted the VA to "set the example for the rest of the Federal Government" by maximizing the contracts awarded to VOSBs and SDVOSBs in recognition of veterans' considerable sacrifices to this country. *H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 2 (2005) ("2005 Hearing") (statement of Chairman Boozman). The Federal Circuit essentially rewrote the statute that Congress

intended by holding that § 8127(d) only requires a Veterans Rule of Two analysis until certain goals are met. *See* Pet. App. 17a-21a. As discussed below, not only are the Federal Circuit's arguments wrong and inconsistent with the application of the small business Rule of Two across the government, but they directly undercut Congress's clear intention to do *more* to help veterans in the 2006 Veterans Act after finding that prior discretionary statutory regimes had failed to do enough.

A. The History of Congress's Legislation in This Area Demonstrates That Congress Intended the Veterans Rule of Two to Be Mandatory for All VA Contracts.

The essence of the Federal Circuit's holding below was that the VA should not have to use the so-called Veterans Rule of Two "*after* it has met the [VOSB and SDVOSB] goals set under § 8127(a)." Pet. App. 19a-20a (emphasis in original). The Federal Circuit apparently reasoned that the 2006 Veterans Act intended for the VA to precisely meet its pre-established VOSB and SDVOSB contracting goals (but never actually *exceed* them) and then abandon any interest in fostering veteran-owned businesses until the start of the next fiscal year.

The court's rationale is untenable in light of Congress's steadfast commitment to *maximizing* opportunities for veterans. "It is the policy of the United States that ... [VOSBs and SDVOSBs] ... shall have the *maximum practicable opportunity* to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d) (emphasis added).

Accordingly, Congress designed § 8127(d) to ensure that VOSBs and SDVOSBs are "routinely ... granted the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592 at 14-15 (2006), and that the VA would "put veteran businesses at the head of the line for small business set-asides," *A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 1 (2006) (statement of Chairman Boozman). Congress did not merely want the VA to meet certain quotas and then move on—Congress wanted the VA to exceed its quotas and maximize the involvement of veterans in the American economy. *See* Pet. App. 30a (Reyna, J., dissenting) ("[P]articipation goals are aspirations, not destinations."). Indeed, Congress enacted the 2006 Veterans Act with the specific intent of doing more to increase contract awards to veterans from the very agency charged with the special responsibility for helping veterans. Congress was frustrated because past legislation had failed, and veterans continued to be drastically underrepresented in government contracting.

Among Congress's past attempts to help veterans was the Veterans Entrepreneurship and Small Business Development Act of 1999 ("1999 Act"), *see* Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234, which amended the Small Business Act. The 1999 Act was intended to "raise the awareness of federal procurement officials" as to the underrepresentation of service-disabled veterans in government awards. H.R. Rep. No. 106-206, pt. 1 at 14 (1999). The Act required each federal agency to set an annual goal of no less than

3% of total contract awards for SDVOSB contracts. *See* 1999 Act § 502, 133 Stat. at 247. However, the Act lacked teeth: agencies were not forced to set aside any contracts for service-disabled veteran-owned businesses and were not formally encouraged to do so. As a consequence, the Act was a failure and contract awards fell well short of even the paltry 3% goal. *See, e.g., The State of Veterans' Employment: Hearing Before the H. Comm. on Veterans Affairs*, 108th Cong. 21-22 (2003); Pet. App. 4a-5a (noting that VA awarded only 0.1% of its contracts to SDVOSBs in 2000, 0.2% in 2001, and 0.6% in 2002).

Congress tried again in 2003, amending the Small Business Act by passing the Veterans Benefit Act of 2003 ("2003 Act"). *See* Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662. The 2003 Act went a little further: it stated a preference for service-disabled veteran-owned businesses to receive government contract awards, *see id.*, but the decision to award such contracts was ultimately left to the discretion of the contracting officers. *See* 15 U.S.C. § 657f(b) (officer "may" award contracts to SDVOSBs under the Veterans Rule of Two). Again, the legislation failed to produce measurable returns. As of 2005, "virtually no Federal agency, including the VA, ha[d] achieved either the spirit or will of the law" in terms of SDVOSB contract awards. 2005 Hearing at 2. Indeed, "total federal agency contracting with [SDVOSB] amounted to only 0.605 percent in 2005," well below the goal of 3%. H.R. Rep. 109-592 at 16.

Following these failed efforts, there was widespread "frustrat[ion] with respect to the efforts of the majority

of federal agencies to enter into contracts with [SDVOSBs]," *id.* at 15-16, and Congress appropriately concluded that this state of affairs was unacceptable, especially for the VA, which is tasked with "serving and honoring the men and women who are America's Veterans." U.S. Dep't of Veterans Affairs, *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp (last visited Aug. 24, 2015). Congress believed that the failure of its prior acts stemmed from "a culture of indifference or ignorance by many procurement officials with respect to the [SDVOSB] provisions." H.R Rep. 109-592 at 15-16. Congress heard testimony stating that "the discretionary, not mandatory, nature of the goals" and "the lack of real contracting tools (such as set-asides or restricted contracts)" were significant reasons why the prior acts had failed. *Id.* at 15. In other words, legislative experimentation had proven that purely discretionary tools would fail to ensure that veterans could adequately compete for federal procurement contracts.

Accordingly, Congress passed the 2006 Veterans Act to remedy the problems of prior legislation and "improve on [the] VA's contracting efforts" with VOSBs and SDVOSBs. H.R Rep. 109-592 at 15; *id.* at 14 (noting that veterans, through their sacrifices, "ha[d] earned the opportunity to compete for VA contracts"). As part of its goal of maximizing the contract awards for veterans, the 2006 Veterans Act required the VA to establish annual benchmarks for VOSB and SDVOSB contract awards. *See* 38 U.S.C. § 8127(a). Given the failure of prior legislation to remedy the underrepresentation of veterans in contract awards,

Congress wanted the VA not just to meet, but to *exceed* its goals and maximize business awards for veterans. Indeed, this was explicitly confirmed by the House Committee on Veterans Affairs, which stated that "the provisions of [the 2006 Veterans Act] will provide the VA with the necessary procurement tools to meet, *if not exceed*, its contracting goals." H.R Rep. 109-592 at 15 (emphasis added).[3]

Congress thus made a distinct policy choice: a genuinely mandatory procurement requirement would ensure that discretion and indifference would no longer prevent VOSBs and SDVOSBs from participating fully in the economy. Accordingly, the "may" in the 2003 Act was changed to "shall" in the 2006 Veterans Act. *Compare* 15 U.S.C. § 657f(b) (a contracting officer "*may* award contracts on the basis of competition restricted to" SDVOSBs when Rule of Two is satisfied (emphasis added)), *with* 38 U.S.C. § 8127(d) ("a contracting officer of the [VA] *shall* award contracts on the basis of competition restricted to" VOSBs and SDVOSBs when the Veterans Rule of Two is satisfied (emphasis added)). Given the failure of prior discretionary policies, and the existing Rule of Two for small businesses, this word change was not merely an exercise in semantics.

The VA and the Federal Circuit have both cited to a single line in the legislative history that they claim shows that the change from "may" to "shall" was

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[3] The exceptions to the Veterans Rule of Two outlined in § 8127(b) and (c)—which are even *more* pro-veteran than § 8127(d)—also illustrate that Congress was set on maximizing the business opportunities available to veterans.

intended to refer to the VA's goals, not to the Veterans Rule of Two analysis. *See* Pet. App. 20a-21a (quoting Chairman Boozman as stating that § 8127 "changed what has been a 'may' to a 'shall' in terms of goals"); BIO 14 (same). However, that reference to "goals" has been taken out of context. Chairman Boozman—who joins this brief—was key in shepherding the 2006 Veterans Act through Congress, and he made pellucidly clear that the "VA should set the example for the rest of the Federal Government," 2005 Hearing at 2, by "routinely ... grant[ing VOSBs and SDVOSBs] the primary opportunity to enter into VA procurement contracts," H.R. Rep. No. 109-592, at 14-16. But the VA could not "set the example" when it still "lack[ed] real contracting tools (such as set-asides or restricted contracts)" and exercised considerable discretion in awarding contracts. *Id.* at 15. Thus, Chairman Boozman insisted that the Veterans Rule of Two language be changed from "may" to "shall," because "it is very difficult to get things done with agencies if we don't make them do it." 2005 Hearing at 29. The Federal Circuit and the VA were wrong to place such weight on one part of one line of legislative history mentioning goals, when the weight of the legislative history clearly shows that Congress realized a mandatory Veterans Rule of Two was the only way to boost the anemic rate of awards to VOSBs and SDVOSBs.

The Federal Circuit's decision below ignores Congress's considered judgment about what would work best to implement the goals of helping veterans in the government contracting marketplace and essentially changed the "shall" back into a "may." By

concluding that § 8127(d) is not always mandatory, the Federal Circuit returned the VA to a system where it exercises vast discretion in determining when it can favor VOSBs and SDVOSBs. That is precisely why the prior acts failed, and precisely why Congress made § 8127(d) mandatory. Thus, the Federal Circuit's decision effectively repeals the most-important aspect of the 2006 Veterans Act, undercutting Congress's exclusive prerogative to weigh policy considerations and favor business opportunities for veterans.

B. Congress Enacted the 2006 Veterans Act in Recognition of the Unique Challenges Faced by VOSBs and SDVOSBs.

Congress's interest in maximizing the involvement of veterans in the government contracting marketplace was based on a desire to address the special challenges that veterans have always faced in returning to civilian life. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) ("He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.").

As Congress recognized, veterans often spend their prime years in defense of the nation, forgoing opportunities to obtain traditional civilian certifications and academic credentials. Congress also recognized that "often former servicemembers are not able to obtain licenses or certification for the civilian equivalents based on their military experience and training," which means veterans must incur additional

"expens[es]," "duplicative training[,] and lost time on-the-job" just to obtain the same credentials that non-veterans possess. H.R Rep. 109-592, at 20-21. Additionally, "many servicemembers who separate from the military and enter civilian life would prefer to seek employment in the civilian workforce that reflects generally the skills and experience they gained during their military service rather than seek a degree at a traditional post-secondary institution," *id.* at 21, which means that veterans often do not have the traditional academic credentials that competing non-veteran business owners will possess.

The effects of these difficulties are borne out in employment figures. At the height of unemployment in 2011, recent veterans (serving since 2001) had an overall unemployment rate of 12.1%, compared to 8.7% for non-veterans. Bureau of Labor Statistics, *Employment Status of Persons 18 Years and Over by Veteran Status, Age, and Sex*, http://www.bls.gov/cps/aa2011/cpsaat48.pdf. It was even worse for certain demographics, such as young female veterans (ages 18-24), who had an unemployment rate of 36.1%, compared to 14.5% for non-veteran females of the same age. *Id.*

Recognizing the difficulties faced by veterans and confronting the fact that prior legislation was simply not working, Congress made a policy choice: the VA would set ambitious goals for VOSB and SDVOSB awards, and the mandatory Veterans Rule of Two would ensure that the VA not only met, but *exceeded* those goals. Thus, contrary to the Federal Circuit's conclusion, there were significant policy rationales

behind § 8127(d)'s mandate that the VA apply a Rule of Two analysis for VOSBs and SDVOSBs, even after the VA meets its annual goals. Congress's strong interest in maximizing veterans' business opportunities and in supporting small businesses is unwavering; it does not disappear and reappear depending on whether the VA has met self-imposed annual goals.

C. A Mandatory Veterans Rule of Two Analysis Does Not Strip the VA of All Discretion, Nor Does It Impose a Substantial Burden.

In reaching its erroneous conclusion below, the Federal Circuit also reasoned that interpreting § 8127(d) to apply to all contracts would be bad policy because it could render superfluous the VA's discretion in setting its annual goals and impose a substantial burden on the VA. *See* Pet. App. 17a-18a. These rationales are misguided.

As a threshold matter, it was not the Federal Circuit's place to pass judgment on the policy decisions of Congress. As this Court has noted, the "wisdom of Congress' action ... is not within [the judiciary's] province to second-guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003). "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962). By picking and choosing its preferred interpretation of the 2006 Veterans Act, the Federal Circuit improperly trespassed onto Congress's "exclusive domain" to weigh policy considerations and make law.

The Federal Circuit's reasoning also completely overlooked Congress's desire to *limit and focus* the VA's discretion, not remove it entirely. It is true that veterans' total share of VA procurement contracts will be heavily influenced by the application of the Veterans Rule of Two to all contracts, but that was Congress's intent. After years of failing to satisfy even paltry goals using a discretionary award system, Congress realized that something had to change, and that is precisely why it made the Veterans Rule of Two mandatory for the VA. *See* H.R Rep. 109-592 at 15-16.

However, it was erroneous for the Federal Circuit to conclude that the VA no longer has any discretion at all when awarding contracts. While the VA always must conduct a Veterans Rule of Two *analysis*, the VA still retains discretion to decide whether there is a reasonable expectation that the Veterans Rule of Two will *actually be satisfied* for any given contract. Under § 8127(d), a set-aside for VOSBs or SDVOSBs must occur only when the VA procurement officers have a reasonable expectation that (a) offers will be made by at least two responsible VOSBs or SDVOSBs and (b) an award can be made at fair market prices. *See* § 8127(d); Pet. App. 30a (Reyna, J., dissenting). Congress recognized that, as part of the process, "acquisition officials will exercise reasonable judgment," 152 Cong. Rec. 23,515 (2006), and the VA's decision will be subject only to "highly deferential rational basis review," *ResCare, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013) (quotation marks omitted). Accordingly, veterans' total share of VA procurement contracts still will be determined largely by the VA's business judgment as to whether there are potentially at least

two viable VOSB or SDVOSB offerors for any particular contract.

Also misplaced is the Federal Circuit's suggestion that making the Veterans Rule of Two mandatory for all contracts would be overly burdensome for the VA. *See* Pet. App. 18a. This is erroneous for several reasons. *First*, as discussed above, the VA is not required to follow the set-aside procedure in § 8127(d) unless the VA first determines that the conditions for the Veterans Rule of Two are actually satisfied.

Second, Congress knew that all government contracts over $3,000 already go through a mandatory Rule of Two analysis for small businesses, subject to certain exceptions. *See* 48 C.F.R. § 19.502-2. Section 8127(d) simply requires that the VA conduct the very same analysis for VOSBs and SDVOSBs that every government agency—including the VA itself—already conducts for small businesses in general.[4] This renders implausible the Federal Circuit's and the VA's suggestion that a mandatory Rule of Two analysis would impose a substantial burden. *See* Pet. App. 29a (Reyna, J., dissenting) ("The majority does not address the practical implications of its decision in light of the VA's *existing* obligations under the Federal

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[4] Mandating that the Veterans Rule of Two continue to be applied even after the VOSB and SDVOSB goals have been satisfied is also consistent with the Federal Acquisition Regulation's ("FAR's") policy towards small businesses in general. The FAR requires that agencies conduct a Rule of Two analysis regardless of whether the agency's "small business goals have already been satisfied." *LBM, Inc.*, B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, at 9.

Acquisition Regulation ('FAR') to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000." (emphasis in original)).

Third, the VA's regulations implementing the 2006 Veterans Act state that the VA can still make small scale purchases using the authority of § 8127(b) and (c). *See* 48 C.F.R. §§ 813.106, 819.7007-.7008. This is directly contrary to the VA's argument that it would have to conduct a Rule of Two analysis every time it wants to buy a "griddle or food slicer." BIO 12.

Although the Federal Circuit may think otherwise, Congress concluded that it was good policy for the VA to set aside contracts for VOSBs and SDVOSBs whenever the conditions of § 8127(d) are satisfied. *Amici*, a broad and diverse group of Members of Congress, have come together to ensure that Congress's considered judgment cannot be trumped by the Federal Circuit's misplaced concerns about whether a mandatory Rule of Two is good policy for the VA.

II. The Federal Circuit's Opinion Creates an Untenable Situation As It Is Impossible for Either the VA or Those with Whom the VA Contracts to Know When VOSB and SDVOSB Goals Are Met.

The Federal Circuit's interpretation of § 8127(d) is flawed for the additional reason that it is based on the erroneous belief that VA can measure the progress on its VOSB and SDVOSB goals in real-time so that each and every contracting officer in the VA knows when to start and stop applying the Veterans Rule of Two. As

Congress well knew, this is impossible under the current budgetary process and reporting requirements.

Congress knows how to pass legislation where a mandatory regulation for procurement awards would be turned on and off based on an agency's success or failure—yet the 2006 Veterans Act contains no such language. The mandate in § 8127(d) is just that: mandatory, for *all* contracts.

A. It Is Impossible for the VA or Those with Whom It Contracts to Determine When the Statutory Goals of § 8127(a) Are Met in a Given Fiscal Year.

The Federal Circuit held that the Veterans Rule of Two applies only until the VA satisfies its VOSB and SDVOSB contracting goals set pursuant to § 8127(a). Pet. App. 19a-20a. After that, the Federal Circuit held, the requirement no longer applies, and the VA can return to the prior discretionary award system.

However, that interpretation makes sense only if it is possible for the VA to gauge in real-time where it stands *vis á vis* its annual VOSB and SDVOSB goals. Because VOSB and SDVOSB goals are set as percentages of the total dollar value of the VA's procurement awards, the VA would have to be able to determine in advance: (a) the total amount it will spend on procurement for the year, and (b) the year-end distribution of its spending on procurement (*i.e.*, who the contracts are going to). *See* 15 U.S.C. § 644(g)(1)(A)(i), (ii).

Congress was well aware that this would be an impossible task for the VA, which does not keep track

of its actual procurement spending or the distribution of that spending in real-time. Although the VA must report most contracts to the Federal Procurement Data System ("FPDS") within three business days of the contract award, *see* 48 C.F.R. § 4.604(b)(2), the FPDS data does not have to be certified as complete and accurate until 120 days *after* the fiscal year ends, *id.* § 4.604(c). Additionally, while the VA must measure the extent of participation by small businesses for each fiscal year, the VA does not have to report that data to the Small Business Administration ("SBA") until the *end of the fiscal year*, *see id.* § 19.202-5(b), and, in fact, these reports often take *half* of the following fiscal year to compile, *see* Press Release, SBA, *SBA Announces Results of 2014 Small Business Federal Procurement Scorecard*, U.S. Small Bus. Admin. (June 24, 2015), http://tinyurl.com/pm7wszt (announcing, six months behind schedule, the small business results for fiscal year 2014).

Further, the VA's spending is not smooth throughout the fiscal year: it is well known that government agencies have long employed a use-it-or-lose-it mentality when it comes to their budgets, rushing to spend all of their appropriations just before the fiscal year ends. *See The Annual Agency Battle to Spend the Rest of Their Annual Budget*, Wash. Post, Sept. 28, 2013, http://tinyurl.com/lsgzpdv. The VA is no exception: according to information from the public FPDS database, in fiscal year 2014, the VA obligated 40% of its annual VOSB and SDVOSB spending during the fourth quarter, with 14.1% coming during the final *week* alone. *See* Federal Procurement Data System, https://www.fpds.gov.

This practice has two relevant consequences for the Federal Circuit's interpretation of § 8127: (1) the VA's uneven spending patterns make it that much harder for anyone to *predict* when the VA might satisfy its annual VOSB and SDVOSB goals; and (2) the frenzy of spending at year's end makes it even more difficult to determine in *real-time* the precise point when the goals might be satisfied—and by the time the VA could make such a determination, the fiscal year would have already ended and another begun. Given this lack of real-time data, there is no point during the fiscal year when the VA can declare that its § 8127(a) goals are met for that year. Yet, the Federal Circuit's interpretation of § 8127(d) implies that Congress intended for the VA to do just that.[5]

Further, because the VA cannot know when the Secretary's VOSB and SDVOSB goals will be met in a given fiscal year, there is certainly no way for those with whom the VA might contract to know. The Federal Circuit's interpretation would create confusion by making it difficult for non-veteran-owned small businesses to predict in advance when the Veterans Rule of Two will be applied. A system that changes the rules of competition at some indeterminable time (and possibly in the middle of a competition) would make it impossible for any small business to know when it should expend bid and proposal dollars in pursuing a possible award, or when it would be unlikely to receive

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[5] It is also unlikely that Congress would have relied on the VA's self-reporting. In fact, there has been considerable debate over the accuracy of the VA's accounting methods for small-business awards. *See* Pet. 21 n.4.

an award because it would face full and open competition for VA contracts. There is no reason why Congress would have sought to present VOSBs with such uncertainty while ostensibly attempting to assist those very businesses.

B. Congress Knows How to Draft Legislation Where Mandatory Procurement Requirements Expire When an Agency Meets Certain Goals—and the Veterans Act Does Not Contain Any of the Hallmarks of Such Legislation.

Even putting aside the Federal Circuit's erroneous assumption that the VA can measure its success in *real-time*, there is also a complete lack of legislative indicia suggesting that Congress intended the Veterans Rule of Two to turn on and off based on any sort of *post hoc* analysis of whether the VA met its benchmarks. Congress knows how to draft legislation where mandatory procurement requirements are relaxed or removed upon an agency's showing that it is has met certain awards benchmarks. An example is the Small Business Competitiveness Demonstration Program Act of 1988 ("SBCDP"), Pub. L. No. 100-656, 102 Stat. 3853, which was on the books from 1988 until 2010.

The SBCDP was enacted in 1988 to "eliminate obstacles to competition and thereby to broaden small business participation." *Id.* § 702(2), 102 Stat. at 3889. Under the SBCDP, participating agencies were required to set a goal of awarding 40% of the dollar value for each designated industry group to small businesses. *Id.* § 712(a), 102 Stat. at 3890. Agencies also were required to make a good faith effort to award

no less than 15% of the dollar value of these contracts to small businesses. *Id.*

To be sure that agencies met these goals, Congress required agencies to monitor their small business participation goals "on a quarterly basis." *Id.* § 712(d)(1), 102 Stat. at 3891. Agency reviews were based on "the aggregate of contract award data from the 4 quarters preceding the date of the review for which data is available." *Id.* Agencies that failed to attain their small business participation goals were *required* to award future contracts on the basis of a competition that was restricted only to eligible small businesses. *Id.* § 713(b), 102 Stat. at 3892. Congress then permitted agencies to reinstate full and open competition "*upon determining that [the agency's] contract awards to small business concerns meet the required goals.*" *Id.* (emphasis added).

The SBCDP is an example of Congress making clear its intent to monitor agencies' quarterly results, and, based on that *post hoc* analysis, impose or relax mandatory procurement procedures depending on a particular agency's success. The 2006 Veterans Act, by contrast, contains none of these elements. There is no quarterly or other special reporting, no penalties for failure to comply, and no relaxation of mandatory policies upon a showing of compliance. Congress certainly knew about the SBCDP and easily could have modeled the 2006 Veterans Act after it. But Congress chose not to do so, and, as *amici* recognize from their combined decades of experience, such a legislative choice is normally purposeful.

The Federal Circuit's interpretation of § 8127(d) is erroneous because there is no way the VA could measure its results in real-time, nor is there any evidence suggesting that Congress intended for the Rule of Two's set-aside mandate to turn on and off depending upon the VA's success or failure. The simpler explanation is the correct one: the Veterans Rule of Two analysis is mandatory for all contracts.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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ADDENDUM

Amici Curiae Members of Congress

Rep. Gus Bilirakis (R-FL)
Rep. Marsha Blackburn (R-TN)
Sen. John Boozman (R-AR)
Rep. Mike Bost (R-IL)
Rep. Corrine Brown (D-FL)
Rep. Steve Chabot (R-OH)
Rep. Judy Chu (D-CA)
Rep. Mike Coffman (R-CO)
Rep. Ryan A. Costello (R-PA)
Rep. Susan A. Davis (D-CA)
Rep. Bill Flores (R-TX)
Rep. Chris Gibson (R-NY)
Rep. Raúl M. Grijalva (D-AZ)
Rep. Frank Guinta (R-NH)
Rep. Janice Hahn (D-CA)
Rep. Richard L. Hanna (R-NY)
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Rep. Mike Honda (D-CA)
Rep. Will Hurd (R-TX)
Rep. Bill Johnson (R-OH)
Rep. Ann Kirkpatrick (D-AZ)
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Rep. Ann M. Kuster (D-NH)
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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL VETERAN SMALL BUSINESS COALITION ET AL. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. The Panel Majority's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses 8

II. The Panel Majority's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs 10

III. The Panel Majority's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA 15

IV. The Panel Majority's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Viegas v. Shinseki, 705 F.3d 1374 (Fed. Cir. 2013) 19

Matter of Aldevra, 2012 CPD ¶ 112, 2012 U.S. Comp. Gen. LEXIS 69 (Comp. Gen. Mar. 14, 2012) 17

Federal Statutes

38 U.S.C. § 8127(a) 18

38 U.S.C. § 8127(d) ..... Passim

Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 ..... Passim

Federal Regulations

48 C.F.R. § 819.7004 19

48 C.F.R. § 819.7005 15

48 C.F.R. § 819.7006 15

VA Acquisition Regulation, 74 Fed. Reg. 64,619 (Dec. 8, 2009) 8

Non-Periodical Publications

Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military*

Service and Experience to Put Veterans and Military Spouses Back to Work (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf 11

GAO Report to Congress, 2012 WL 5510908, (Comp. Gen. Nov. 13, 2012) 15

GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do 14

Barry L. McVay, *Getting Started in Federal Contracting* (5th ed., 2009) 9, 12

Office of Acquisition and Logistics, *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp 14

Office of Acquisition and Logistics, *Prospective Contractors*, *http://www.va.gov/oal/business/fss/prospective.asp* 13, 15

Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners* (Mar. 2012) 9

Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013) 9

Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp 11

Gunjan Tulati & Joelle E.K. Laszlo, *After Kingdomware, an FSS Contract May Be a Key to the VA's Procurement Castle* (Jan 23, 2013) 15

Veterans Entrepreneurship and Self Employment: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 110th Cong. 7-9 (2007) (Statement of Anthony Jimenez) 13

The National Veteran Small Business Coalition, the Task Force for Veterans' Entrepreneurship, Division Construction Inc., Spartan Medical Inc., Women Veterans Business Solutions LLC, and Crosstown Courier Service, Inc. submit this brief in support of Kingdomware Technologies, Inc.'s Petition for Certiorari.[1]

INTEREST OF AMICI CURIAE

The National Veteran Small Business Coalition ("NVSBC") was formed in 2010 with the express purpose of leveling the playing field for veteran-owned and service-disabled veteran-owned small businesses in federal contracting. On behalf of more than 200 members, the NVSBC promotes enhanced opportunities for veteran-owned and service-disabled veteran-owned small businesses to participate in federal contracting and subcontracting.

The Task Force for Veterans' Entrepreneurship ("Vet-Force") is composed of over 200 organizations and affiliates representing thousands of veterans throughout the United States, many of which own small businesses. Vet-Force advocates for veteran entrepreneurs, monitors the implementation of veterans' programs, and promotes opportunities for veterans seeking to succeed in small business.

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[1] Pursuant to Sup. Ct. R. 37.2(a), amici provided timely notice of their intention to file this brief. The parties have consented to the filing of this brief. Counsel for amici authored this brief in whole and no other person or entity other than amici, their members or counsel made a monetary contribution to the preparation or submission of this brief.

Division Construction Inc. ("DCI") was incorporated in 2013 by a former United States Navy air traffic controller who now wholly owns and operates the company. DCI provides quality construction services with a focus on electrical and control contracts primarily for the Department of Veterans Affairs ("VA") in the New York City metropolitan area. DCI also provides construction management services, general contractor services, and supply services. Since incorporation and immediate verification as a service-disabled veteran-owned small business, DCI has allowed its owner and employees the opportunity and privilege to continue serving the United States by providing quality and timely construction services at VA medical facilities.

Spartan Medical Inc. was founded in 2008 by a former Air Force intelligence officer in an effort to provide an extensive array of advanced medical devices and technologies focused on the needs of the VA and Department of Defense. Spartan Medical collaborates with ethical manufacturing partners to provide innovative, state-of-the-art medical devices and technologies that meet the ongoing challenges of surgical and clinical care. Spartan Medical is a service-disabled veteran-owned small business, verified as such by the VA.

Women Veterans Business Solutions LLC ("WVBS") is a small market research and public opinion polling organization that has operated in Philadelphia, Pennsylvania since 2006. A service-disabled veteran-owned small business, WVBS facilitates networking among women veterans for business and employment purposes. WVBS also

performs market analysis and research with respect to economic issues faced by women veterans, including women veterans who consider contracting with the VA.

Crosstown Courier Service, Inc. ("Crosstown") of Chicopee, Massachusetts is a service-disabled veteran-owned small business that also employs other veterans. Established in 1998, Crosstown provides delivery, logistics, and warehousing services to the VA and other clients nationwide. Prior to an abrupt reduction in contracting opportunities with the VA, Crosstown provided time-sensitive transportation of diagnostic specimens to laboratories, among other services to the VA. Crosstown protested before the Government Accountability Office ("GAO") the VA's compliance with the statute at issue in this case, and the GAO sustained Crosstown's protest in 2012. The VA declined to implement the GAO's recommendation.

The panel majority's opinion interpreting the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 (the "2006 Act") affects not only Kingdomware Technologies, Inc., but 2.5 million veteran-owned small businesses throughout the United States, including DCI, Spartan Medical, WVBS, Crosstown, and many of the members of NVSBC and Vet-Force. The panel majority's opinion severely undermines the ability of veteran-owned small businesses and service-disabled veteran-owned small businesses to transact with the VA, contrary to federal law and Congress's express purposes.

SUMMARY OF ARGUMENT

No statute could repay the debt our nation owes its veterans. But veterans are entitled to expect that the terms of the statutes that are enacted—here, a nine-year-old statute with a mandatory provision providing a targeted opportunity to bid on contracts with the VA—are interpreted correctly, and in accordance with Congress's express directions and purposes. The panel majority's decision failed to live up to that basic expectation.

The effect of the panel majority's misreading is grave. By reading out the mandatory mechanism of the statute in favor of a non-binding, prefatory statement, the panel majority diminished the statutorily protected opportunity of veteran-owned small businesses ("VOSBs") and service-disabled veteran-owned small businesses ("SDVOSBs") to do business with the VA.

Data from 2007 indicate that an estimated 60% of the VA's purchases may be conducted through the Federal Supply Schedule ("FSS")—and therefore outside competitive bidding—in a given year. Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009).[2] The practical effect of the panel majority's decision is that roughly $10 billion of the VA's $18 billion in annual purchases may be exempt from competitive bidding by VOSBs and SDVOSBs. As such, every single one of the 2.5 million VOSBs (and 200,000 SDVOSBs)[3] that might seek to do business with the VA (especially the tens of thousands that are already registered with the VA) will now have drastically reduced opportunities to compete.

In turn, the panel majority's decision gives new, unwarranted importance to inclusion in the FSS, despite the fact that the FSS is nowhere exempted from the scope of the 2006 Act by the Act's terms, or even mentioned in the Act. Pet. App. 12a.

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[2] The panel majority cited a newspaper article for the proposition that in 2011 the VA used the Federal Supply Schedule ("FSS") for 20% of its total spending. Pet. App. 4a.

[3] The Small Business Administration ("SBA") estimates that there are nearly 2.5 million veteran-owned small businesses today. *See* Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, 1 (Mar. 2012), http://www.sba.gov/sites/default/files/393tot.pdf. The SBA estimates that there are roughly 200,000 service-disabled veteran-owned businesses. *See* Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013), https://www.sba.gov/sites/default/files/SDVOSB_workbook_0.pdf.

The VA's FSS includes a small fraction of the estimated 37,000 registered VOSBs and 12,500 registered SDVOSBs. By elevating the FSS beyond what Congress intended, the panel majority deprived thousands of VOSBs and SDVOSBs of the chance to bid for contracts under the 2006 Act. In limiting the ability of VOSBs and SDVOSBs to contract with the VA, the panel majority's ruling undermined the 2006 Act and removed a crucial stepping-stone for VOSBs and SDVOSBs to succeed. Barry L. McVay, *Getting Started in Federal Contracting*, 183 (5th ed., 2009) ("One of the most direct ways the government can encourage and nurture small businesses is through federal contracts.").

Nor will the panel majority's decision avoid the harm it believes would flow from the interpretation urged by the GAO, the Petitioner, and Judge Reyna's dissenting opinion. The panel majority eliminated the effect of the word "shall" in 38 U.S.C. § 8127(d) out of concern that it would be burdensome for VA contracting officers to execute garden-variety procurements under a veteran-friendly scheme, *cf.* Pet. App. 19a-20a, even if the contracting officer might determine that the VA could get a better deal through a competitive bid than through the FSS. But in rewriting the word "shall" and tethering the VA contracting officers to the VA's daily progress towards its annual goals, the panel majority's decision causes the very harm it purports to avoid.

Under the panel majority's interpretation, each VA contracting officer must now hesitate before executing a procurement decision and attempt to ascertain the VA's progress towards its annual

contracting goals. In addition to creating immediate uncertainty for VOSBs and SDVOSBs, the panel majority nowhere explained how a VA contracting officer might accomplish this unusual obligation (which finds no home in the 2006 Act or its implementing regulations).[4] In attempting to avoid an imaginary harm (placing the VA contracting officer in a straitjacket), the panel majority caused a greater one—a cumbersome progress determination before every purchase—that both burdens the contracting officer and harms VOSBs and SDVOSBs. That is the opposite of what Congress intended in enacting the 2006 Act.

The uncertainty created by the panel majority's decision, and the diminished opportunity for thousands of VOSBs and SDVOSBs to do business with the VA, are contrary to federal law and merit this Court's immediate attention. This Court should grant certiorari to ensure that Congress's express statutory mechanism for veteran contracting is preserved.

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[4] Pet. App. 20a. "[T]here is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a (Reyna, J., dissenting).

ARGUMENT

I. The Panel Majority's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses

The panel majority's misreading of the 2006 Act neutralizes the Act's targeted means of helping veterans build their businesses after completing years of service to the nation.

Section 8127(d)'s mandate that "restricted competition"—in the form of competitive bidding between eligible VOSBs and SDVOSBs—"shall" apply came against the backdrop of persistent, government-wide obstacles to increasing contracting with VOSBs and SDVOSBs. Congress enacted the 2006 Act and its provision targeted to the VA because prior attempts to bolster VOSB and SDVOSB contracting had fallen unacceptably short. Pet. App. 5a. Companies may declare a willingness to hire veterans or do business with VOSBs and SDVOSBs,[5] but, in practice, Congress has determined that pledges and government

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[5] Though many companies profess that they would be happy to hire a veteran or engage with a business owned by a veteran, in practice veterans face obstacles that non-veterans simply do not. *See* Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work*, 4-7 (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf ("Labor Market Challenges for Military Families").

encouragement are not enough, and responded with targeted legislation. Section 8127(d) does not apply to all government purchasing, only that by the VA. Pet. App. 5a. The VA is a fitting department to take on additional responsibility for promoting veteran-owned business contracting.[6] Changing course from prior legislative attempts, the 2006 Act moves from a hortatory model to one that requires specific action by the VA.

The panel majority's recasting of the meaning of the word "shall" in § 8127(d) eliminates an important stepping-stone for VOSBs and SDVOSBs. Founders, owners, and officers of VOSBs and SDVOSBs obtain valuable experience and special skills through their years of service. It should be no surprise that when veterans start small businesses, they often draw on the skills honed as well as the experiences gathered from their years of service to build companies that seek to enhance the lives of their fellow veterans, whether that be through new medical technology, advanced equipment, or other innovative products and services. The panel majority's decision diminishes the opportunity of VOSBs and SDVOSBs to compete for contracts with the VA, and to use such competitive opportunities to make inroads in the private sector. A veteran's small business not only benefits directly from competitive bidding when that mechanism leads to a contract,

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[6] The VA itself embraces this mandate. "This procurement authority, and its subsequent implementation, is a logical extension of VA's mission, to care for our nation's Veterans." Office of Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp (last visited Feb. 26, 2015).

but indirectly when competitive bidding opens doors to private sector opportunities. The opportunities afforded by competitive bidding build competency and market presence for VOSBs and SDVOSBs, the benefits of which extend well beyond any one government contract. *See* McVay, *supra*, at 183.

The 2006 Act's mandatory restricted competition provision is no accident; it is designed to use the VA as a targeted incubator for VOSB and SDVOSB contracting. Pet. App. 5a (Congress enacted "a statute specifically and only directed to the VA."). Interpreting the 2006 Act such that it is no longer mandatory in practice, and instead is only mandatory until certain goals are met, deprives VOSBs and SDVOSBs of the targeted support Congress intended those businesses to receive through competition before the VA.

II. The Panel Majority's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs

There are thousands of SDVOSBs and VOSBs already registered with the VA, and just a fraction of those businesses are on the FSS. The panel majority permits the VA to resort to the FSS without first allowing SDVOSBs and VOSBs an opportunity to offer competitive bids under § 8127(d)'s mandatory mechanism. Under the panel majority's decision, a federal statute designed to promote thousands if not millions of veteran-owned businesses will now primarily enhance the small fraction of VOSBs and SDVOSBs that are already on the FSS (should they

be chosen by the contracting officer resorting to the FSS). In prioritizing the FSS over the terms of the statute, the panel majority exempted 60% of VA business from competitive bidding, and arrived at a result divorced from what Congress intended.

As of 2007, there were over 12,500 SDVOSBs and 37,000 VOSBs registered in the Contractor Central Registry. *See* Veterans Entrepreneurship and Self Employment: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 110th Cong. 7-9 (2007) (statement of Anthony Jimenez, President and Chief Executive Officer of MicroTech, LLC). These numbers represent not all VOSBs and SDVOSBs that exist, but merely the subset that has completed all of the necessary administrative procedures to become registered and ready to bid for contracts. *Id.*

The FSS is nowhere exempted from the scope of the 2006 Act, yet the panel majority makes exempting the FSS from the scope of the Act the keystone of its opinion. Pet. App. 3a-4a. In so doing, the panel majority elevates the FSS to a position far removed from the statute's aims. In order to be eligible for an FSS contract, a business must have $150,000 in commercial sales or $25,000 in Government sales annually.[7] In practice, only a limited number of VOSBs and SDVOSBs have been included in the VA FSS.

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[7] Office of Acquisition and Logistics (OAL), *Prospective Contractors*, http://www.va.gov/oal/business/fss/prospective.asp (last visited Feb. 26, 2015).

Publicly available data from the VA and GSA confirm that VOSBs and SDVOSBs are significantly outnumbered on the FSS.[8] The VA FSS Service manages nine multiple award schedule programs under three areas: Pharmaceuticals, Commodities, and Services.[9] On seven of the nine VA Schedules, the number of VOSBs and SDVOSBs range from 0-40. On two of the nine Schedules, there are no VOSBs or SDVOSBs at all. The two largest Schedules (65 II A, "Medical Equipment & Supplies," and 621 I, "Professional & Allied Healthcare Staffing Services") include 4,639 and 2,834 companies, respectively. VOSBs (excluding SDVOSBs) comprise less than 5% and 3% of the businesses included in these two Schedules; SDVOSBs comprise approximately 16% and 8% of the same Schedules.[10]

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[8] The panel majority cited a newspaper article for the proposition that "in 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to VOSBs." Pet. App. 4a (*citing* Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Small Businesses*, WASH. POST, Nov. 14, 2011, at A20).

[9] *See* Office of Acquisition and Logistics (OAL), *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last visited Feb. 26, 2015) (identifying the nine schedules by group number: 65 I B, 65 II A, 65 II C, 65 II F, 65 VII, 65 V A, 66 III, 621 I, 621 II).

[10] These unofficial figures are based on data retrieved on February 24, 2015 from the GSA's publicly available electronic library, which acts as the "one source for the latest GSA contract award information." GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do (last visited Feb. 24, 2015). The eLibrary identifies through downloadable Excel tables profile data on contractors presently included the

The panel majority's decision thus diverts billions of dollars from millions of potentially qualified competitors by taking opportunities for VOSB and SDVOSB bids out of the competitive contracting process and reserving them to the FSS. By adopting an approach that immunizes the contracting officers' reliance on the FSS, the panel majority excluded millions of veteran-owned businesses from billions of dollars of contracts.

In no small irony, the VA itself encourages businesses seeking to be placed on the FSS to conduct market research before applying to the FSS, though the VA exempts itself from conducting market research before resorting to the FSS. The VA counsels:

> It is recommended that you conduct market research to identify and assess your competition prior to submitting a proposal. Review current contractor pricing, terms, and conditions available on NAC Contract Catalog Search Tool, GSA eLibrary or GSA Advantage!. Your review of the competition should include: competitor's pricing, delivery times, warranty terms, services, and any other elements that make their

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nine VA FSS schedules. *Id.* (data available for VA's nine schedules searchable by group number). The profile data for each contractor indicates whether the contractor is veteran-owned or service-disabled veteran-owned.

> offering distinct when compared to your own.[11]

The VA's recommendation that market research be conducted is well taken, and applies equally to the VA and its contracting officers.

The panel majority's decision elevates the VA's FSS in a manner contrary to the terms and intent of the 2006 Act.[12] The panel majority's analysis gave pride of place to the FSS despite the fact that the VA FSS is not mentioned in the 2006 Act, and the panel majority misconstrued Congressional silence as an intent to exclude 60% of all purchasing done by the VA from the Act's scope. The harm that this misreading exacts on veteran small businesses warrants the Court's attention.

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[11] Office of Acquisition and Logistics (OAL), *Prospective Contractors* http://www.va.gov/oal/business/fss/prospective.asp (last visited Feb. 26, 2015).

[12] Practitioners immediately called attention to the heightened importance of the FSS under an interpretation that re-wrote the meaning of the word "shall" in § 8127(d). *See, e.g.*, Gunjan Tulati & Joelle E.K. Laszlo, *After Kingdomware, an FSS Contract May Be a Key to the VA's Procurement Castle* 2, (Jan 23, 2013) http://www.globalregulatoryenforcementlawblog.com/uploads/file/alert13010.pdf (noting after the ruling by the Court of Federal Claims in the *Kingdomware* litigation that the result was "positive news for current FSS contract holders" and a potential "Key to the VA's Procurement Castle").

III. The Panel Majority's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA

The panel majority's decision creates significant uncertainty for those doing business with the VA because the treatment of each contract will depend on a moving target—the VA's progress to date—rather than a mandatory mechanism. The panel majority's decision elevates an aspirational goal at the expense of a mandatory statutory provision, undermining the expectations of those companies that attempt to contract with the VA. The Court should restore the expectations of VOSBs, SDVOSBs, and Congress, who all understand that "shall" means "shall."

Under the proper interpretation of the 2006 Act, and prior to using another procurement method, the VA must first assess whether it can make a purchase using restricted competition (i.e. whether at least two qualified SDVOSB or VOSB bidders exist that can submit offers that lead to an award at a fair and reasonable price and offering best value). 38 U.S.C. § 8127(d); 48 C.F.R. §§ 819.7005, 7006 (SDVOSB and VOSB bidding, relative to other businesses). If the VA concludes it cannot make a purchase using restricted competition, the VA may rely on the FSS to carry out the purchase. *See GAO Report to Congress*, 2012 WL 5510908, at *3 (Comp. Gen. Nov. 13, 2012). But under the panel majority's approach, the VA need not use restricted competition unless the VA in its discretion deems it necessary to meet its purchasing goals. Pet. App. 20a ("[T]he agency need not perform a VOSB Rule of Two

analysis for every contract, as long as the goals set under subsection [§ 8127](a) are met.").[13]

By placing the mandatory clause at the mercy of a prefatory statement, the panel majority's decision deprives both the VA and those businesses seeking to do business with the VA of certainty as to whether and how a given contract will be made available for bid. Depending on how the VA is doing in approaching its goals, a contracting officer may feel compelled to place a contract up for bid, or not. Pet. App. 30a-32a (Reyna, J., dissenting). The panel majority's approach means that the VA itself cannot offer clarity or consistency as to what opportunities are available to VOSBs and SDVOSBs.

The uncertainty caused by the panel majority tracks the VA's recent departure from the settled understanding of the 2006 Act. It was the view of the GAO that the VA abruptly unsettled the expectations of VOSBs and SDVOSBs in 2012 as to the correct interpretation of the 2006 Act. The GAO in *Matter of Aldevra*, 2012 CPD ¶ 112, 2012 U.S. Comp. Gen. LEXIS 69 (Comp. Gen. Mar. 14, 2012) noted that

> although the agency has defended numerous protests before our Office involving precisely this issue, this is the first time that the agency has raised these arguments. Thus, until this protest, the agency had not suggested

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[13] The Rule of Two is a "procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses." Pet. App. 5a.

> that the phrase "for purposes of meeting the goals under subsection (a)" as it appears in 38 U.S.C. § 8127(d) grants the agency discretion to decide that in some procurements the mandate in the statute will apply, and in other procurements it will not.

Id. at *8-9. The Court should grant certiorari to eliminate this seesawing and provide clarity for the Department that Congress selected to set the standard for veteran contracting.

Absent reversal by this Court, the panel majority's ruling means that, contrary to Congress's express direction, it will no longer be the case that a competitive bid process between VOSBs and SDVOSBs "shall" be ordered when eligibility and other criteria are met. Instead, and unlike the statutory mechanism directed by Congress, the bid process will depend on moving targets, rendering the likelihood of any bid award for veteran-owned businesses dependent on how many contracts have been awarded to that date (if the contracting officer is even able to obtain such information, which is doubtful).[14] As noted by the dissent, each VA contracting officer must now hesitate before each procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals, even though "there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a. This obligation to hesitate and conduct an analysis of the

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[14] Pet. App. 27a (Reyna, J., dissenting).

progress of the VA as a whole finds no home in the 2006 Act or its implementing regulations. The uncertain and ad hoc process fashioned by the panel majority is simply foreign to the text and aims of the statute.

IV. The Panel Majority's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA

Implicit in the panel majority's ruling is the apprehension that giving the statute's terms their full effect would hamstring the VA and needlessly burden the contracting officer. *See* Pet. App. 19a-20a (describing as a "concession" Kingdomware's contention at oral argument that "under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even after it has met the goals set under § 8127(a)"). This apprehension is misplaced. The true cause for concern is the stifling of veterans' competitive bidding under the panel majority's decision.

The statute mandates the "Use of restricted competition," § 8217(d), not the "Use of veteran-owned small businesses in all cases." Restricted competition—in the form of the application of the Rule of Two—is applied only when "the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Absent that reasonable expectation as to the three

essential components (two or more business concerns, fair and reasonable price, and best value to the United States), restricted competition is not even used (under the correct reading of the statute). Fearing imaginary constraints on the VA contracting officers, the panel majority created its own flawed system to the detriment of SDVOSBs and VOSBs.

Protecting the statutory rights of veterans does not mean that VA purchasing will grind to a halt, burdened by needless competitive bidding. The VA is already subject to various other statutory obligations that influence its procurement decisions.[15] The panel majority's weakening of veterans' protections in the 2006 Act does not promote a frictionless, free-market contracting system—just a distorted one that Congress never intended. And aside from the fact that a court should not be guided in its interpretation of a federal statute by what outcome would be easiest for a contracting officer,[16] the panel majority's decision does not even achieve that outcome.

Instead, by allowing the goal-setting language to trump the mandatory language of 8127(d), the statute obligates each contracting officer to conduct a daily determination as to the VA's progress towards

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[15] 48 C.F.R. § 819.7004 (SDVOSBs and VOSBs are followed in priority by small disadvantaged businesses, "Historically-Underutilized Business Zone" businesses, and businesses identified pursuant to any other small business contracting preference).

[16] "[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Viegas v. Shinseki*, 705 F.3d 1374, 1380 (Fed. Cir. 2013) (internal quotations omitted).

its goals. Pet. App. 32a (Reyna, J., dissenting) (panel majority's misreading "saddle[s] contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been 'met' before the end of the fiscal year"). This cumbersome, ad hoc process invented by the panel majority makes the VA's job harder, not easier, and forsakes thousands of VOSBs and SDVOSBs.

By placing the word "shall" in "harmonious context," Pet. App. 20a, such that it means "may," the panel majority turned the VA's contracting goals into ceilings. Indeed, under the panel majority's distorted interpretation, the VA would be wrong to exceed its goals by awarding contracts to VOSBs and SDVOSBs in competitive bids once § 8127(d)'s goals had been reached. Pet. App. 29a-30a (Reyna, J., dissenting) (panel majority "finds mischief in requiring contracting officers to continue conducting Rule of Two analyses after the agency's goals are met"); *accord* Pet. App. 32a (Reyna, J., dissenting) ("The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act."). The panel majority's refusal to believe that the mandatory competitive bid mechanism could coexist with the VA's goals, Pet. App. 20a, led the panel majority astray.

A mandatory mechanism is no guarantee of meeting an aspirational goal. Pet. App. 30a (Reyna, J., dissenting) ("[P]articipation goals are aspirations, not destinations."). Parents who load their children

into the car for a trip to the Eastern Shore of Maryland may set the car on cruise control at 55 miles per hour, but that is no guarantee that the family will arrive at a desired time. Attaining that goal depends on the availability of open lanes on the highway, the accessibility of gas stations along the way, the suitability of driving conditions, and a variety of other requirements. Just as the cruise control setting is no guarantee of timely arrival at the shore, so too is the mandatory Rule of Two mechanism no guarantee that the VA will hit its target. Section 8127(d)'s mandatory mechanism is fully consistent with the 2006 Act's aspirational goal. Indeed, it is the panel majority that has reached a dissonant, and not harmonious, result by refashioning beyond recognition the core statutory mechanism for promoting competitive bidding by VOSBs and SDVOSBs.

CONCLUSION

Legislation like the 2006 Act cannot repay a nation's debt; it is just a shadow of the country's gratitude. But the 2006 Act deserves to be interpreted as written.

The panel majority's flawed interpretation of the 2006 Act affects millions of veterans, their businesses, and their employees across the nation. Left undisturbed, the panel majority's interpretation will dramatically reduce the opportunities for VOSBs and SDVOSBs to do business with the Department that Congress selected to uniquely assist veterans' small businesses. The Court should grant certiorari to restore the expectations of veteran-owned businesses and Congress.

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL VETERAN SMALL BUSINESS COALITION ET AL. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. The Federal Circuit's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses 10

II. The Federal Circuit's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs 13

III. The Federal Circuit's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA 17

IV The Federal Circuit's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA 20

CONCLUSION 24

TABLE OF AUTHORITIES

Federal Cases

In re Aldevra,
2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 4

In re Aldevra,
2012 WL 860813 (Comp. Gen. Mar. 14, 2012) 4

King v. Burwell, 135 S. Ct. 2480 (2015) 7

Stone v. INS, 514 U.S. 386 (1995) 17

United States v. Rodgers, 466 U.S. 475 (1984) 22

Yates v. United States, 135 S. Ct. 1074 (2015) 8

Federal Statutes

38 U.S.C. § 8127(a) 22

38 U.S.C. § 8127(d) ..... *Passim*

Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 7

Rules

SUP. CT. R. 37.3(a) 1

SUP. CT. R. 37.6 1

Regulations

48 C.F.R. § 819.7004 23

48 C.F.R. § 819.7005 19

48 C.F.R. § 819.7006 19

VA Acquisition Regulation, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009) 9, 15

Legislative Materials

H.R. Rep. No. 109-592 (2006) 12, 16

Other Authorities

Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work*, 4-7 (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf 11

GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do 15

Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) 20

Barry L. McVay, *Getting Started in Federal Contracting* (5th ed., 2009) 9, 13

Office of Acquisition and Logistics, *Prospective Contractors*, http://www.va.gov/oal/business/fss/prospective.asp.....15, 18

Office of Acquisition and Logistics (OAL), *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last visited August 15, 2015) 15

Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners* (Mar. 2012) 7

Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013).....7

Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp (last visited Feb. 26, 2015).....12

The National Veteran Small Business Coalition, the National Association for Black Veterans, the National Veteran Business Development Coalition, the National Veteran-Owned Business Association, the Task Force for Veterans' Entrepreneurship, Women Veterans Business Solutions LLC, Crosstown Courier Service, Inc., Aldevra LLC, Division Construction Inc., Spartan Medical Inc., AeroSage LLC, BlackBox Migrations LLC, VetLikeMe, VanDahl Engineering & Sales, SMART, POTHOS, Inc., Shelby Distributions, and Applied Fab and Machining submit this brief in support of Kingdomware Technologies, Inc.

INTEREST OF AMICI CURIAE[1]

Amici are several national veterans organizations representing thousands of veteran-owned businesses and individual veteran entrepreneurs. Amici also include individual veteran-owned small businesses and service-disabled veteran owned businesses.

Amici share the common aim of protecting the statutory rights of veterans and veteran-owned businesses.

The National Veteran Small Business Coalition ("NVSBC") was formed in 2010 to help level the playing field for veteran-owned and service-disabled vet-

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that both parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

eran-owned small businesses in federal contracting. On behalf of more than 200 members, the NVSBC promotes enhanced opportunities for veteran-owned small businesses to participate in federal contracting and subcontracting.

The National Association for Black Veterans ("NABVETS") is an organization certified by the Department of Veterans Affairs ("VA") to represent veterans before the Board of Veterans' Appeals and to provide assistance to veterans filing claims for their benefits. Representing nearly 50,000 members, NABVETS was formed in the early 1970s to provide support for the unmet needs of African-American veterans returning from the war in Vietnam. NABVETS in the years since has provided a variety of services to veterans of all wars and regardless of race, while maintaining as a priority the concerns of African-American and minority veterans.

The National Veteran-Owned Business Association ("NaVOBA") is a national organization representing more than 53,000 businesses and individuals. NaVOBA supports veteran-owned businesses by, among others, encouraging corporations, government departments, and the public to purchase products and services from veteran-owned businesses.

The Task Force for Veterans' Entrepreneurship ("Vet-Force") is composed of over 200 organizations and affiliates representing thousands of veterans throughout the United States, many of which own small businesses. Vet-Force advocates for veteran entrepreneurs, monitors the implementation of veterans' programs, and promotes small business opportunities for veterans.

The National Veteran Business Development Council ("NVBDC") is the Nation's leading third-party authority for certification of veteran-owned businesses of all sizes and the corporations that seek to engage them. Through its review and certification process, NVBDC helps veteran-owned and service-disabled veteran-owned businesses become eligible for business opportunities with the United States and with private companies.

Strengthening The Mid-Atlantic Region For Tomorrow ("SMART") is a 501(c)(3) organization founded by a U.S. Army veteran that promotes science and technology initiatives in the Mid-Atlantic region, and which maintains as a priority supporting veteran entrepreneurs and their businesses.

Crosstown Courier Service, Inc. ("Crosstown") is a service-disabled veteran-owned small business that also employs other veterans. Established in 1998, Crosstown provides delivery, logistics, and warehousing services to the VA and other clients nationwide. Prior to an abrupt reduction in contracting opportunities with the VA, Crosstown provided time-sensitive transportation of diagnostic specimens to laboratories, among other services to the VA. Crosstown protested before the Government Accountability Office ("GAO") the VA's compliance with the statute at issue in this case, and the GAO sustained Crosstown's protest in 2012. The VA declined to implement the GAO's recommendation.

Aldevra LLC is a service-disabled veteran-owned food service and medical equipment provider specializing in federal government procurement. Established in 2009 and based in Michigan, Aldevra has

successfully performed as the prime contractor on several federal and state government contracts. The VA's failure to comply with the Act caused Aldevra to lose substantial opportunities and led to several bid protests. *See Aldevra*, B-405271, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011); *Aldevra*, B-406205, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012). In these cases, the GAO agreed with Aldevra, rejecting the same VA arguments presented in this case. The VA declined to follow the GAO.

Division Construction Inc. ("DCI") was incorporated in 2013 by a former United States Navy air traffic controller. DCI provides quality construction services with a focus on electrical and control contracts primarily for the VA in the New York City metropolitan area. DCI also provides construction management services, general contractor services, and supply services. Since its founding, DCI has allowed its owner and employees the opportunity and privilege to continue serving the United States by providing quality and timely construction services at VA medical facilities.

Spartan Medical Inc. was founded in 2008 by a former Air Force intelligence officer in an effort to provide an extensive array of advanced medical devices and technologies focused on the needs of the VA and Department of Defense. A service-disabled veteran-owned small business, Spartan Medical collaborates with ethical manufacturing partners to provide innovative, state-of-the-art medical devices and technologies that meet the ongoing challenges of surgical and clinical care.

Women Veterans Business Solutions LLC ("WVBS") is a small market research and public opinion polling organization that has operated in Philadelphia, Pennsylvania since 2006. A service-disabled veteran-owned small business, WVBS facilitates networking among women veterans for business and employment purposes. WVBS also performs market analysis and research with respect to economic issues faced by women veterans, including women veterans who consider contracting with the VA.

AeroSage LLC is a Florida-based service-disabled veteran-owned small business that provides professional services both to government organizations as well as businesses seeking to contract with the government. AeroSage's clients include government agencies and departments, prime government contractors, small businesses, and emerging high-technology companies.

Shelby Distributions Inc. (d/b/a Express Office Products) is a service-disabled veteran-owned business that provides, stores, delivers, and installs office furniture and office supplies. Based in El Paso, Texas, Shelby Distributions has served the private sector and the government for 15 years, and is also certified as a woman-owned small business and minority-owned small business.

BlackBox Migrations LLC ("BlackBox") is a service-disabled veteran-owned small business that offers project management and database management solutions to both private industry and the government. Based in Texas and Washington, D.C., BlackBox aims to provide services and staffing to the fed-

eral government with all the discipline and commitment of its founder's past service.

VanDahl Engineering & Sales Ltd. of Scottsdale, Arizona ("VanDahl"), is a veteran-owned engineering and construction firm established in 1986. VanDahl provides building renovations and repairs, electronic security and surveillance systems, finishing installations, masonry, road work, and preventive maintenance for patient lift systems and hospital beds.

POTHOS, Inc., is a service-disabled veteran-owned small business that provides logistics, meeting management, and staffing for private and government clients. Based in California, POTHOS also serves other service-disabled business organizations such as the California Disabled Veteran Business Alliance and the National Veteran-Owned Business Association.

VetLikeMe is a news publication owned and operated by service-disabled veterans. Established in 2010 by a disabled veteran with thirty years of experience in government public relations, VetLikeMe reports on issues relevant to service-disabled veteran-owned businesses. VetLikeMe also advocates for expanded opportunities for veteran-owned businesses to compete in federal contracting.

Applied Fab and Machining is a contract manufacturer of high-precision machined and fabricated parts for the defense and commercial industries. Applied Fab and Machining is a service-disabled veteran-owned business whose CEO is a West Point graduate and combat veteran.

* * *

The Federal Circuit's opinion interpreting the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 (the "2006 Act") affects not only Kingdomware Technologies, Inc., but 2.5 million veteran-owned small businesses and 200,000 service-disabled veteran-owned businesses throughout the United States,[2] including the amici identified above. The Federal Circuit's opinion severely undermines the ability of veteran-owned small businesses to transact with the VA, contrary to federal law and Congress's express purposes.

SUMMARY OF ARGUMENT

No statute could repay the debt our Nation owes its veterans. But veterans are entitled to expect that the terms of the statutes that are enacted—here, a nine-year-old statute with a mandatory provision providing a targeted opportunity to bid on contracts with the VA—are interpreted correctly, and in accordance with Congress's express directions and purposes. The Federal Circuit failed to live up to that basic expectation.

This is not a case where "strong" arguments in favor of a statute's plain meaning spar with arguments in favor of preserving the workability of the statute in light of its "context and structure." *King v.*

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[2] Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, 1 (Mar. 2012), http://www.sba.gov/sites/default/files/393tot.pdf; Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013), https://www.sba.gov/sites/default/files/SDVOSB_workbook_0.pdf.

Burwell, 135 S. Ct. 2480, 2495 (2015). Plain meaning and workability are both aligned on the side of Kingdomware.

Nor is this a case where the Court is faced with a catchall phrase and the parties debate whether it should be read broadly or narrowly in light of surrounding language and the statute's core purposes. *Yates v. United States*, 135 S. Ct. 1074 (2015). The term at issue in this case directly targets the core objective Congress identified: expanding competitive bidding opportunities through a mandatory mechanism. By denying the plain meaning of Congress's words and substituting a judicially created "harmonious" result, Pet. App. 20a, the Federal Circuit rendered the 2006 Act a shell of what it its words intended it to be.

The effect of the Federal Circuit's misreading is grave. By reading out the mandatory mechanism of the statute in favor of a non-binding, prefatory statement, the Federal Circuit significantly weakened the statutorily protected opportunity of veteran-owned small businesses ("VOSBs") and service-disabled veteran-owned small businesses ("SDVOSBs") to do business with the VA.

Despite the fact that the Federal Supply Schedule is nowhere exempted from the scope of the 2006 Act by the Act's terms, or even mentioned in the Act, the Federal Circuit's decision gives new, unwarranted importance to whether a business is included on the Schedule. Pet. App. 12a. Data from 2007 indicate that an estimated 60% of the VA's purchases may be conducted through the Schedule—and therefore out-

side competitive bidding—in a given year.[3] The practical effect of the Federal Circuit's decision is that roughly $10 billion of the VA's $18 billion in annual purchases may be exempt from competitive bidding by VOSBs and SDVOSBs. As such, the 2.5 million VOSBs and 200,000 SDVOSBs that might seek to do business with the VA will now have drastically reduced opportunities to compete.

By avoiding what Congress actually wrote, and by prizing a Schedule about which Congress said nothing at all, the Federal Circuit distorted the 2006 Act and removed a crucial stepping-stone for veteran-owned businesses to succeed in the private market. Barry L. McVay, *Getting Started in Federal Contracting*, 183 (5th ed., 2009) ("One of the most direct ways the government can encourage and nurture small businesses is through federal contracts.").

Nor will the Federal Circuit's decision avoid the harm it believes would flow from the interpretation urged by the GAO, Kingdomware, the amici, and Judge Reyna's dissenting opinion. The Federal Circuit eliminated the effect of the word "shall" in 38 U.S.C. § 8127(d) out of concern that it would restrict the VA and burden the contracting officer. Pet. App. 19a-20a. But in rewriting the word "shall" and tethering the VA contracting officers to calculations of the VA's daily progress towards its annual goals, the Federal Circuit's decision causes the harm it purports to avoid.

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[3] Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). The Federal Circuit cited a newspaper article for the proposition that in 2011 the VA used the Federal Supply Schedule for 20% of its total spending. Pet. App. 4a.

Under the Federal Circuit's interpretation, each VA contracting officer must now hesitate before executing a procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals. In addition to creating immediate uncertainty for veterans, the Federal Circuit nowhere explains how a VA contracting officer might accomplish this unusual obligation (which finds no home in the 2006 Act or its implementing regulations).[4] In attempting to avoid an imaginary harm (placing the VA contracting officer in a straitjacket), the Federal Circuit caused a genuine and severe one—a cumbersome progress determination before every purchase—that both burdens the contracting officer and harms VOSBs and SDVOSBs. That is the opposite of what Congress intended in enacting the 2006 Act.

The Court should reverse the Federal Circuit's decision and restore Congress's express statutory mechanism for enhancing competitive bidding by veteran-owned small businesses.

ARGUMENT

I. The Federal Circuit's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses

The Federal Circuit's misreading of the 2006 Act neutralizes the Act's targeted means of helping veterans build their businesses after completing years of service to the Nation.

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[4] Pet. App. 20a. "[T]here is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a (Reyna, J., dissenting).

Section 8127(d)'s mandate that "restricted competition"—in the form of competitive bidding between eligible VOSBs and SDVOSBs—"shall" apply came against the backdrop of persistent, government-wide obstacles to increasing contracting with VOSBs and SDVOSBs. Congress enacted the 2006 Act and its provision targeted to the VA because prior attempts to bolster VOSB and SDVOSB contracting had fallen unacceptably short. Pet. App. 5a. Companies may declare a willingness to hire veterans or do business with VOSBs and SDVOSBs,[5] but, in practice, Congress determined that pledges and government encouragement were not enough. Likewise, Congress recognized that attempts to enhance the awareness of government contracting officers and leverage their discretion had not succeeded. Pet. Br. 11-13; H.R. Rep. No. 109-592, at 15 (2006).

Section 8127(d) does not apply to all government purchasing, only that by the VA. Pet. App. 5a. Given its historical mandate, the VA was a fitting department to take on additional responsibility for promoting veteran-owned business contracting.[6]

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[5] Though many companies profess that they would be happy to hire a veteran or engage with a business owned by a veteran, in practice veterans face obstacles that non-veterans simply do not. *See* Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work*, 4-7 (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf ("Labor Market Challenges for Military Families").

[6] The VA itself embraces this mandate. "This procurement authority, and its subsequent implementation, is a logical exten-

Changing course from prior legislative attempts, the 2006 Act moved from a hortatory model to one that requires specific action by one department.

The Federal Circuit's recasting of the meaning of the word "shall" in § 8127(d) misses the key change that the 2006 Act directed, and eliminates a crucial stepping-stone for veteran businesses. The 2006 Act's mandatory restricted competition provision was no accident; it was designed to use the VA as a targeted incubator for veteran contracting. Pet. App. 5a (Congress enacted "a statute specifically and only directed to the VA."). Founders, owners, and officers of VOSBs and SDVOSBs – such as those of the amici businesses – obtained valuable experience and special skills through their years of service. It should be no surprise that when veterans start small businesses, they draw on the skills honed as well as the experiences gathered from their years of service to build companies that seek to enhance the lives of their fellow veterans and the services provided at the VA, whether through new medical technology, advanced equipment, or other innovative products and services.

The Federal Circuit's decision dismantles the statutory mechanism for VOSBs and SDVOSBs to compete for contracts with the VA, and to use such competitive opportunities to make inroads in the private sector. A veteran's small business not only benefits directly from competitive bidding when that

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sion of VA's mission, to care for our nation's Veterans." Office of Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp (last visited Aug. 24, 2015).

mechanism leads to a contract, but indirectly when competitive bidding opens doors to private-sector opportunities. The opportunities afforded by competitive bidding build competency and market presence for VOSBs and SDVOSBs, the benefits of which extend well beyond any one government contract. *See* McVay, *supra*, at 183.

In recognition of the unique sacrifices veterans make, and the unique challenges veterans face upon returning from duty, Congress established not a subsidy, grant, or government-wide guarantee, but simply a mechanism for competitive bidding before one government department uniquely positioned to serve veterans. Interpreting the 2006 Act such that it is no longer mandatory in practice, and instead is only mandatory until certain goals are met (if at all), deprives VOSBs and SDVOSBs of the targeted support Congress intended.

II. The Federal Circuit's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs

The Federal Circuit's ruling prizes the Federal Supply Schedule in a manner divorced from the actual text of the 2006 Act. The Schedule is nowhere mentioned in, or exempted from the scope of, the 2006 Act, yet the Federal Circuit makes the Schedule the keystone of its opinion. Pet. App. 3a-4a. In so doing, the Federal Circuit avoids the text of the 2006 Act in favor of Congressional silence. The Federal Circuit's immunizing of the Schedule and the contracting officer's corresponding discretion is contrary to the 2006 Act's mandatory mechanism.

The Federal Circuit's decision permits the VA to resort to the Federal Supply Schedule without first allowing SDVOSBs and VOSBs an opportunity to offer competitive bids under § 8127(d)'s mandatory mechanism. Under the Federal Circuit's decision, a federal statute designed to promote thousands if not millions of veteran-owned businesses will now primarily enhance the fraction of VOSBs and SDVOSBs that are already on the Schedule (should they be chosen by the contracting officer resorting to it). In prioritizing the Federal Supply Schedule over the terms of the statute, the Federal Circuit exempts 60% of VA business from competitive bidding by qualified veterans, Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009), and arrives at a result that is at odds with what Congress intended.

In order to be eligible for a Federal Supply Schedule contract, a business must have $150,000 in commercial sales or $25,000 in Government sales annually, and meet a variety of other criteria.[7] Publicly available data from the VA and GSA confirm that VOSBs and SDVOSBs are significantly outnumbered on the Federal Supply Schedule.[8] The VA Federal Supply Schedule Service manages nine multiple award schedule programs under three areas:

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[7] Office of Acquisition and Logistics, *Prospective Contractors*, http://www.va.gov/oal/business/fss/prospective.asp (last visited Aug. 24, 2015).

[8] The Federal Circuit cited a newspaper article for the proposition that "in 2011, the VA used Federal Supply Schedule contracts for 20% of its total spending, and 13% of these Federal Supply Schedule expenditures went to VOSBs." Pet. App. 4a (citation omitted). As noted by Kingdomware, the accuracy of such figures has since been called into question. Pet. Br. 57-58.

Pharmaceuticals, Commodities, and Services.[9] On six of the nine VA Schedules, VOSBs and SDVOSBs number fewer than 40 (out of hundreds), and on two there are no VOSBs or SDVOSBs at all.[10] Even where VOSBs and SDVOSBs are reasonably represented on the schedules, that inclusion is no guarantee of obtaining a contract. Indeed, veteran-owned businesses on the Schedule have none of the 2006 Act's protections, and remain subject to the "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006).

In concluding that "shall" in section 8127(d) did not mean "shall," the Federal Circuit was quite certain that its decision avoided surplusage *within* the 2006 Act, Pet. App. 19a, and quoted a 2010 Federal Circuit opinion for the "rule of statutory construction that Congress does not use unnecessary words." *Id.* (citation omitted). But aside from finding surplusage where none existed, the Federal Circuit's misreading

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[9] *See* Office of Acquisition and Logistics, *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last visited Aug. 15, 2015) (identifying the nine schedules by group number: 65 I B, 65 II A, 65 II C, 65 II F, 65 VII, 65 V A, 66 III, 621 I, 621 II).

[10] These unofficial figures are based on data retrieved on August 15, 2015 from the GSA's publicly available electronic library, which acts as the "one source for the latest GSA contract award information." GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do (last visited Aug. 15, 2015). The eLibrary identifies through downloadable Excel tables profile data on contractors presently included the nine VA Federal Supply Schedule schedules. *Id.* (data available for VA's nine schedules searchable by group number). The profile data for each contractor indicates whether the contractor is veteran-owned or service-disabled veteran-owned.

tacitly concluded that Congress had uttered a bevy of unnecessary surplusage in enacting the 2006 Act entirely. The Federal Circuit jettisoned the linguistic differences *between* the 2006 Act and the 2003 law it amended, and eliminated the core change the 2006 Act intended. That was error. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). The Federal Circuit ignored the new design and mandatory language of the 2006 Act, leaving in its wake the discretionary tools that had already proven inadequate.

The Federal Circuit's decision thus diverts billions of dollars from hundreds of thousands of potentially qualified competitors by taking bids out of the competitive contracting process and leaving them to the discretion of contracting officers and the Federal Supply Schedule. By adopting an approach that immunizes the contracting officers' reliance on the Schedule, the Federal Circuit excluded thousands of veteran-owned businesses from competition for billions of dollars of contracts.

In no small irony, the VA itself encourages businesses seeking to be placed on the Schedule to conduct market research before applying for inclusion on it. The VA counsels:

> It is recommended that you conduct market research to identify and assess your competition prior to submitting a proposal. Review current contractor pricing, terms, and conditions available on NAC Contract Catalog Search Tool, GSA eLibrary or GSA *Advantage*!.

> Your review of the competition should include: competitor's pricing, delivery times, warranty terms, services, and any other elements that make their offering distinct when compared to your own.[11]

The VA's recommendation that market research be conducted is well taken, and—under the correct reading of the 2006 Act—applies equally to the VA and its contracting officers.

The Federal Circuit's decision elevated the Federal Supply Schedule in a manner contrary to the terms and intent of the 2006 Act, and despite the fact that the Schedule is not mentioned in the 2006 Act. The Federal Circuit misconstrued Congressional silence as an intent to exclude 60% of all purchasing done by the VA from the Act's scope. The harm that this misreading exacts on veteran-owned businesses merits reversal.

III. The Federal Circuit's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA

The Federal Circuit's decision creates significant uncertainty for those doing business with the VA because the treatment of each contract will depend on a moving target—the VA's progress to date—rather than a mandatory mechanism. Because the Federal Circuit's decision undermines the expectations of

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[11] Office of Acquisition and Logistics, *Prospective Contractors* http://www.va.gov/oal/business/fss/prospective.asp (emphasis in original) (last visited Aug. 24, 2015).

companies considering contracting with the VA, the Court should reverse the Federal Circuit and restore the expectations of VOSBs, SDVOSBs, and Congress, which all understand that "shall" means "shall."

Under the proper interpretation of the 2006 Act, and prior to using another procurement method, the VA must first assess whether it can make a purchase using restricted competition (i.e. whether at least two qualified SDVOSB or VOSB bidders exist that can submit offers that lead to an award at a fair and reasonable price and offering best value). 38 U.S.C. § 8127(d); 48 C.F.R. §§ 819.7005, 7006. But under the Federal Circuit's approach, the VA need not use restricted competition unless the VA in its discretion deems it necessary to meet its purchasing goals. Pet. App. 20a ("[T]he agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection [8127](a) are met.").[12]

By placing the mandatory clause in § 8127(d) at the mercy of a prefatory statement, the Federal Circuit's decision deprives both the VA and those businesses seeking to do business with the VA of certainty as to whether and how a given contract will be made available for bid. Depending on how the VA is doing in approaching its goals, a contracting officer may feel compelled to place a contract up for bid, or not. Pet. App. 30a-32a (Reyna, J., dissenting). The Federal Circuit's approach means that the VA itself cannot offer clarity or consistency as to what opportunities are available to VOSBs and SDVOSBs.

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[12] The Rule of Two is a "procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses." Pet. App. 5a.

The Federal Circuit's ruling also means that, contrary to Congress's express direction, a competitive bid process between VOSBs and SDVOSBs will not be ordered when eligibility and other criteria are met. Instead, the bid process will always depend on moving targets, rendering the likelihood of any bid award for veteran-owned businesses dependent on how many contracts have been awarded to that date (if the contracting officer is even able to obtain such information, which is doubtful).[13]

As noted by the dissent, each VA contracting officer must now hesitate before each procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals, even though "there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a.

By allowing the goal-setting language to re-write the mandatory language of § 8127(d), the Federal Circuit assumed that each contracting officer will be able to conduct a daily determination as to the VA's progress towards its goals. Pet. App. 32a (Reyna, J., dissenting) (panel majority "saddle[s] contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been 'met' before the end of the fiscal year"). That assumption has no facts to support it.

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[13] Pet. App. 27a (Reyna, J., dissenting).

The obligation to hesitate and conduct an analysis of the progress of the VA as a whole lacks any basis in the 2006 Act, and simply misunderstands how the VA makes purchases. The uncertain and ad hoc process fashioned by the Federal Circuit is foreign to the text and aims of the statute.

IV. The Federal Circuit's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA

Implicit in the Federal Circuit's ruling is the apprehension that giving the statute's terms their full effect would hamstring the VA and needlessly burden the contracting officer. *See* Pet. App. 19a-20a (describing as a "concession" Kingdomware's contention at oral argument that "under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even after it has met the goals set under § 8127(a)"). This apprehension is misplaced. The true cause for concern is the stifling of veterans' competitive bidding under the distorted system conceived by the Federal Circuit.

This was not The Case of the Speluncean Explorers. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). There was no need for the Federal Circuit to resort to drastic statutory maneuvers that would avoid the effects of the Act's express terms. The statute simply mandates the "Use of restricted competition," § 8127(d); it does not mandate the "Use of veteran-owned small businesses in all cases." Restricted competition—in the form of the application of the Rule of Two—is applied only when "the contracting officer has a reasonable expectation that two or more small business concerns

owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Absent that reasonable expectation as to the three essential components (two or more business concerns, fair and reasonable price, and best value to the United States), restricted competition is not even used (under the correct reading of the statute).

Fearing imaginary constraints on the VA contracting officers, the Federal Circuit created a flawed system to the detriment of SDVOSBs and VOSBs, and in defiance of the scope of the Act that Congress chose. *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

Respecting Congress's choice and upholding the statutory rights of veterans does not mean that VA purchasing will grind to a halt, burdened by needless competitive bidding. The VA is already subject to various other statutory obligations that influence its procurement decisions.[14] *E.g.*, Pet. App. 29a (Reyna, J., dissenting) (noting the VA's "*existing* obligations under the Federal Acquisition Regulation ('FAR') to conduct a Rule of Two analysis in nearly every acquisition exceeding $3,000" (emphasis in original)).

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[14] 48 C.F.R. § 819.7004 (SDVOSBs and VOSBs are followed in priority by small disadvantaged businesses, "Historically-Underutilized Business Zone" businesses, and businesses identified pursuant to any other small business contracting specification).

The Federal Circuit's weakening of veterans' protections in the 2006 Act does not promote a frictionless, free-market contracting system—just a distorted one that Congress never intended. *Id.* And aside from the fact that a court should not be guided in its interpretation of a federal statute by what result would be easiest for a contracting officer, the Federal Circuit's decision does not even achieve that outcome. The cumbersome, ad hoc process invented by the Federal Circuit makes the VA's job harder, not easier, and forsakes the 2006 Act's objectives.

By placing the word "shall" in "harmonious context," Pet. App. 20a, such that it means "may," the Federal Circuit turned the VA's contracting goals into ceilings. Indeed, under the Federal Circuit's distorted interpretation, the VA would be wrong to exceed its goals by awarding contracts to VOSBs and SDVOSBs in competitive bids once § 8127(d)'s goals had been reached. Pet. App. 29a-30a (Reyna, J., dissenting) (panel majority "finds mischief in requiring contracting officers to continue conducting Rule of Two analyses after the agency's goals are met"); *accord* Pet. App. 32a (Reyna, J., dissenting) ("The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act."). The Federal Circuit's refusal to believe that the mandatory mechanism could coexist with the VA's goals led the Federal Circuit astray.

A mandatory mechanism is no guarantee of meeting an aspirational goal. "[P]articipation goals are aspirations, not destinations." Pet. App. 30a (Reyna, J., dissenting). Parents who load their children into the car for a family vacation may set the car on

cruise control at 55 miles per hour, but that is no guarantee that the family will arrive at a desired time.

Attaining that goal depends on the availability of open lanes on the highway, the accessibility of gas stations along the way, the suitability of driving conditions, and a variety of other requirements. Just as the cruise control setting is no guarantee of timely arrival at the destination, so too is the mandatory Rule of Two mechanism no guarantee that the VA will hit its target. Section 8127(d)'s mandatory mechanism is fully consistent with the 2006 Act's aspirational goal. Indeed, it is the Federal Circuit that has reached a dissonant, and not harmonious, result by refashioning beyond recognition the core statutory mechanism for promoting competitive bidding by veteran-owned businesses.

* * *

Legislation like the 2006 Act cannot repay a Nation's debt; it is just a shadow of the country's gratitude. But the 2006 Act deserves to be interpreted as written.

The Federal Circuit's flawed interpretation affects millions of veterans, their businesses, and their employees across the Nation. The Federal Circuit's interpretation dramatically reduces the opportunities for veteran-owned businesses to do business with the department that Congress selected to uniquely assist veterans. The Court should reverse the decision below and restore the expectations of veteran-owned businesses and Congress.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, VIETNAM VETERANS ASSOCIATION, THE MILITARY OFFICERS ASSOCIATION OF AMERICA AND THE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY	4
ARGUMENT	7
I. THE LANGUAGE, STRUCTURE AND HISTORY OF SECTION 8127 REFLECT THAT SUBSECTION (D) IMPOSES A MANDATORY PREFERENCE FOR VETERAN-OWNED BUSINESSES	7
A. The Language And Structure Of Section 8127 Confirm The Mandatory Nature Of The Obligations Under Subsection (d)	7
B. The Statutory History Of Section 8127 Confirms That Congress Intended To Impose A Mandatory Mechanism To Benefit Veteran-Owned Businesses	12
II. THE MANDATORY PREFERENCE IN SUBSECTION 8127(D) SERVES CONGRESS' GOAL OF INCREASING OPPORTUNITIES FOR VETERAN-OWNED BUSINESSES	14
A. Congress Sought To Address The Burdens Facing Veterans By Increasing Contracting Opportunities For Veteran-Owned Small Businesses	15
B. The Alleged Burden On Contracting Officers Is Overstated And Does Not Provide A Basis For Ignoring Congressional Intent	21
CONCLUSION	29

TABLE OF AUTHORITIES

CASES Page

Alabama v. *Bozeman*, 533 U.S. 146 (2001) .. 8
Anderson v. *Yungkau*, 329 U.S. 482 (1947) .. 8, 9
Attorney Gen. of N.Y. v. *Soto-Lopez*, 476 U.S. 898 (1986) 15
Bailey v. *United States*, 516 U.S. 137 (1995), *superseded by statute on other grounds*, An Act To Throttle Criminal Use Of Guns, Pub. L. No. 105-386, 112 Stat. 3469, *as recognized in Abbott* v. *United States*, 562 U.S. 8 (2010) 7
Barber v. *Gonzales*, 347 U.S. 637 (1954) 7
Bowsher v. *Merck & Co.*, 460 U.S. 824 (1983) 26, 28
Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 26, 27
Dist. of Columbia v. *Heller*, 554 U.S. 570 (2008) 9
Dole v. *United Steelworkers of Am.*, 494 U.S. 26 (1990) 7
Eldred v. *Ashcroft*, 537 U.S. 186 (2003) 26
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 8
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 28
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 27
Hilton v. *Sullivan*, 334 U.S. 323 (1948) 13, 14, 26, 28
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 7
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 7
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 7
Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) 8

TABLE OF AUTHORITIES—continued

	Page
Lopez v. *Davis*, 531 U.S. 230 (2001)	9
Manhattan Gen. Equip. Co. v. *Comm'r*, 297 U.S. 129 (1936)	28
MCI Telecomm. Corp. v. *AT&T*, 512 U.S. 218 (1994)	27
Personnel Adm'r of Mass. v. *Feeney*, 442 U.S. 256 (1979)	4, 15
Radazanower v. *Touche Ross & Co.*, 426 U.S. 148	28
Salazar v. *Buono*, 559 U.S. 700 (2010)	26
United States ex rel. Siegel v. *Thoman*, 156 U.S. 353 (1895)	9
United States v. *Gilman*, 347 U.S. 507 (1954)	26
United States v. *Monsanto*, 491 U.S. 600 (1989)	8
Yazoo & Miss. Valley R.R. v. *Thomas*, 132 U.S. 174 (1889)	9

STATUTES AND REGULATIONS

Pub. L. No. 99-318, 100 Stat. 474 (1986)	2
Pub. L. No. 108-183, 117 Stat. 2651 (2003)	18
15 U.S.C. § 644(g)	12
§ 657f	12
36 U.S.C. §§ 170101-170111 (2006)	1
§§ 230501-230513	2
38 U.S.C. § 8127	*passim*
38 C.F.R. § 74.1	22
48 C.F.R. § 810.001	22
§ 819.7005(c)	25

ADMINISTRATIVE DECISIONS

Buy-Rite Transp., B-403729 et al., 2010 CPD ¶ 245 (Comp. Gen. Oct. 15, 2010)	23, 24

TABLE OF AUTHORITIES—continued

Page

Crosstown Courier Serv., Inc., B-407404, 2012 CPD ¶ 333 (Comp. Gen. Nov. 30, 2012) 23, 24

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LEGISLATIVE HISTORY

H.R. 1773, The Native American Veteran Home Loan Act; H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005; and Four Draft Bills: Hearing Before the H. Comm. on Veterans Affairs, Subcomm. on Economic Opportunity, 109th Cong. (2005) 20

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, as described below, are groups that represent and advocate in support of our nation's veterans. *Amici* have a strong interest in the proper application of statutes adopted by Congress to assist veterans by providing preferences that remove barriers veterans face as they return to civilian life. Those interests are implicated by the decision of the Federal Circuit, which effectively interprets 38 U.S.C. § 8127(d) to eliminate the mandates that Congress concluded are necessary to increase contracting opportunities for our nation's veterans.

Paralyzed Veterans of America (PVA) is a non-profit veteran service organization founded in 1946 and chartered by the Congress of the United States. See 36 U.S.C. §§ 170101-170111 (2006). PVA has more than 19,000 members who are veterans of the Armed Forces of the United States and suffer from an injury or disease of the spinal cord. PVA's statutory purposes include: acquainting the public with the needs and problems of paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for paraplegics. PVA carries out these purposes by operating various beneficial programs, such as providing free representation before the Department of Veteran Affairs (VA) to its

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. Letters of blanket consent to the filing of *amicus* briefs by both petitioner and respondent have been lodged with the Clerk of Court pursuant to Rule 37.3.

members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress. PVA also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions.[2]

Vietnam Veterans of America (VVA) is a congressionally-chartered national veteran service organization that is expressly dedicated to ensuring and promoting the rights of Vietnam-era veterans. See Pub. L. No. 99-318, 100 Stat. 474 (1986); 36 U.S.C. §§ 230501-230513. VVA has over 75,000 individual members, 48 state councils, and 650 local chapters. In furtherance of VVA's guiding principle that "Never again will one generation of veterans abandon another," VVA provides broad assistance to *all* veterans and their families, both members and non-members. VVA assists veterans in the prosecution of claims for benefits by providing them with pro bono legal representation before the VA, the Board of Veterans' Appeals and on appeal to the United States Court of Appeals for Veterans Claims. VVA's advocacy on behalf of individual veterans and veterans as a group extends to the legislative arena and broad-impact litigation.

The Military Officers Association of America (MOAA) was founded in 1929. With over 390,000 members today, it is the country's largest professional association for military officers and the fourth largest veterans' association. Membership is

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[2] PVA also is a leading advocate for (i) quality health care for its members, (ii) research and education addressing spinal cord injury and dysfunction, (iii) benefits available as a result of its members' military service, and (iv) civil rights and opportunities that maximize the independence of its members.

open to active duty, National Guard, Reserve, retired and former commissioned officers and warrant officers of the Army, Marine Corps, Navy, Air Force, Coast Guard, Public Health Service and National Oceanic and Atmospheric Administration. MOAA's mission is to advocate for our military community and connect it to the Nation it serves. MOAA advocates for the needs of uniformed services personnel, their families, military retirees, veterans, and surviving spouses and provides information, assistance, and advice, including career transition services, military benefits counseling. member products, educational assistance to children of military families (including families of all ranks, officer and enlisted), and strong involvement in military professionalism activities.

The National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our Nation's 22 million veterans and active duty personnel with the federal benefits they have earned through their service to our country. NVLSP accomplishes its mission through litigation; administrative representation of veterans and active duty personnel before the VA and the military departments on claims for benefits; publication of materials that provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled; and service as a national support center that recruits, trains and assists thousands of lawyer and non-lawyer advocates to represent veterans and active duty personnel on claims for benefits.

The decision of the Federal Circuit below affects small businesses owned by veterans—including disabled veterans—by limiting their ability to

compete for government contracts with the VA. As this Court has explained, programs providing preferences to veterans traditionally are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to [public] service." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 265 (1979). *Amici* have a strong interest in ensuring that the statutory preferences provided to veterans and disabled veterans by Congress are not eliminated or eroded by the decision of the Federal Circuit.

INTRODUCTION AND SUMMARY

Veterans make extraordinary sacrifices in military service and face extraordinary challenges in returning to civilian life. Although they have made significant sacrifices to provide service to their country, these veterans often face indifference or discrimination in pursuing civilian employment and business opportunities. The United States has recognized its obligation to assist these veterans, including those with service-connected disabilities, in competing for government contracts.

In adopting 38 U.S.C. § 8127, Congress established an overarching goal to "increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1). To reach this long-term goal, Congress granted the Department of Veterans Affairs (VA) new tools to improve contracting opportunities for veterans. In subsections (b) and (c), Congress granted the VA *discretionary* authority to award certain sole source contracts to veteran-owned small businesses. *Id.* § 8127(b)-(c). In Section 8127(d), Congress imposed a

mandatory mechanism for VA contracting officers to "award contracts on the basis of competition restricted to small business concerns" where two or more veteran-owned businesses would submit offers and where the award could be made at "a fair and reasonable price that offers best value to the United States." *Id.* § 8127(d). Congress imposed that mandate on the VA because prior legislative efforts that granted contracting officers discretion proved inadequate to the task of increasing opportunities for veteran-owned businesses.

In this case, the judgment of the Federal Circuit severely limits the non-discretionary obligation in Section 8127(d). In support of that ruling, the United States has argued that interpreting Section 8127(d) to impose a mandate on contracting officers is (1) unnecessary because the VA has been meeting annual contracting goals, and (2) unwise because it would be "markedly less efficient" and would require contracting officers to conduct "market research" to determine whether "two or more veteran-owned small businesses" can provide products "at a fair and reasonable price." Brief in Opposition 16. These arguments should be rejected.

First, as detailed by Petitioners, and as discussed below, the language, structure and history of Section 8127 confirm that Congress, in Section 8127(d), imposed a mandate on contracting officers designed to benefit veteran-owned small businesses. The mandate imposed by Section 8127(d) is not limited by the annual participation goals set by the Secretary. Those annual goals do not impose a "ceiling" on participation by veterans, but instead set an annual "floor" on participation as part of Congress' overarching goal in Section 8127(a) to "increase contracting opportunities" for small business

concerns owned by veterans and veterans with service-connected disabilities. Section 8127(d)'s plain language requires that contracting officers pursue that overarching goal by imposing a mandatory mechanism that benefits veteran-owned businesses while protecting competing fiscal interests associated with contracting by the VA.

Second, Congress imposed the mandate under Section 8127(d) with the understanding that the burdens faced by veterans upon their return to civilian life are substantial. Contrary to the United States' position, Congress' principal concern was to provide a preference that would ameliorate the burdens faced by veteran-owned businesses. Congress adopted that preference notwithstanding the fact that a mandatory mechanism might reduce the administrative flexibility of contracting officers. On this point, the United States overstates the burden imposed by the mandate in Section 8127(d) on contracting officers. In all events, it would be inappropriate to eliminate that mandatory mechanism even if doing so might be more convenient for the VA's contracting officers because Congress, through Section 8127(d), resolved the competing policy interests in favor of veteran-owned businesses rather than administrative convenience. To the extent that the government contends that Congress struck the wrong balance, the remedy it seeks lies not with the courts, but with Congress.

ARGUMENT

I. THE LANGUAGE, STRUCTURE AND HISTORY OF SECTION 8127 REFLECT THAT SUBSECTION (D) IMPOSES A MANDATORY PREFERENCE FOR VETERAN-OWNED BUSINESSES.

A. The Language And Structure Of Section 8127 Confirm The Mandatory Nature Of The Obligations Under Subsection (d).

1. The governing principles of statutory construction are well established. "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); accord *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004); see also *Barber* v. *Gonzales*, 347 U.S. 637, 641 (1954) ("[S]tatutory language should be interpreted whenever possible according to common usage."). In assessing the statutory text, this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "'its object and policy,'" *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990).

2. Application of these principles demonstrates that Section 8127(d) imposes a mandate on contracting officers for the benefit of veteran-owned small businesses.

First, the plain language of Section 8127(d) provides that a contracting officer of the VA

> *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added). The use of the term "shall" reflects that Congress intended to impose a mandatory mechanism. Indeed, this Court has explained, repeatedly, that the word "shall" is ordinarily "the language of command." *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001); see *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947); *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935); see also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion"); cf. *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) (explaining that the by using the phrase "shall forfeit," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory").

The mandatory nature of Section 8127(d) is confirmed by the statute's use of the permissive word "may" in subsections (b) and (c) of the statute. The use of both "shall" and "may" in closely related, but distinct, parts of Section 8127 reflects that Congress intended to differentiate between these subsections. Indeed, this Court has explained that when the same statute uses both "may" and "shall" in related sections, the normal inference is that each is used in its usual sense and that the former is permissive, the

latter mandatory. See *Anderson*, 329 U.S. at 485; *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895); *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).

3. The prefatory clause to subsection (d) does not undercut the mandatory nature of the obligation imposed on contracting officers. The clause provides:

> *Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a),* and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans . . . .

38 U.S.C. § 8127(d) (emphasis added). The first part of the prefatory clause resolves any potential conflict between application of the discretionary obligations in subsections (b) and (c) and the mandatory obligation in subsection (d). That clause reflects that contracting officers are not obligated to apply the preference for veteran-owned business in subsection (d) if they have chosen to apply the *discretionary* preferences for veteran-owned businesses under subsections (b) or (c).

The language that follows—"for purposes of meeting the goals under subsection (a)"—does not eliminate the mandatory nature of the obligation imposed on contracting officers. That introductory clause is a statement of purpose that does not "limit or expand the scope of [an] operative clause." *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); see *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); see also 2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014). As such, the legislative statement describing one of the "purposes" of subsection (d) does not "limit or expand"

the operative, mandatory scope of subsection (d), which requires that VA "shall award" contracts pursuant to the criteria in subsection (d).

The United States reads this prefatory language to mean that subsection (d)'s obligations apply only *if* necessary to meet "'the goals under subsection (a).'" Brief in Opposition 14. That argument is mistaken. First, the government overlooks the primary, overarching congressional goal reflected in subsection (a): "to increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1); *see also* H.R. Rep. No. 109-592, at 14 (2006) (stating that the Act was intended to "improve the competitive status of small businesses owned by veterans and service-disabled veterans when competing for VA contracts"). To serve that principal goal, Congress adopted a mandatory mechanism that would provide a preference to veteran-owned small business under subsection (d).

In so doing, Congress set no "ceiling" on the annual goals "for each fiscal year for participation in Department contracts" under subsection (a)(1)(A) or (a)(1)(B). To the contrary, Congress set only a floor on participation so that the "goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act." 38 U.S.C. § 8127(a)(3). Indeed, the United States has acknowledged that these fiscal year goals do not establish a "ceiling" on participation by veteran-owned businesses because Congress intended that Section 8127 would cause "the VA to

contract with small businesses owned by veterans (and service-disabled veterans) *at or above* the percentage rates the Secretary seeks to achieve." Brief in Opposition 13 (emphasis added).

Consistent with that acknowledgement, the annual goals for participation by eligible veterans set by the VA Secretary have increased over time, and the Secretary has asserted that VA has exceeded its goals in each of these years. See Pet. App. 9a. The VA has not alleged that exceeding these goals has interfered in any way with its administration of the statutory scheme or with its other statutory duties. Indeed, the legislative history indicates that Congress intended that VA would meet and exceed the numerical goals of § 8127(a). For example, Representative Boozman, the Chair of the Economic Opportunity Subcommittee of the House Veterans Affairs Committee, and the principal sponsor of the House legislation that eventually became law, said in a floor statement just before final passage, "[t]his bill provides the Department of Veterans Affairs with the tools and requisite authorities to not only meet the goal but to exceed the goal." See 152 Cong. Rec. H9017 (daily ed. Dec. 8, 2006) (statement of Rep. Boozman).

Finally, interpreting subsection (d) to impose a mandatory mechanism would not undermine the importance of the goal-setting requirement in subsection (a). To the contrary, the numerical goals established pursuant to Section 8127(a) would continue to serve as a benchmark for determining whether to exercise discretionary contracting procedures provided under Section 8127(b)-(c) and, more generally, for assessing the success of discretionary and mandatory obligations under Section 8127 in meeting Congress' primary goal "to increase contracting opportunities for small business

concerns owned and controlled by veterans and . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1).

B. The Statutory History Of Section 8127 Confirms That Congress Intended To Impose A Mandatory Mechanism To Benefit Veteran-Owned Businesses.

The statutory history of Section 8127 also confirms that Congress' use of the term "shall" in subsection (d) was designed to impose a mandatory mechanism.

Congress first acted to assist veterans in this regard in 1999, when it amended the Small Business Act to establish an aspirational goal of awarding three percent of all federal government contracts to small businesses owned by veterans with service-connected disabilities. See 15 U.S.C. § 644(g). In practice, however, federal agencies fell short of this goal, awarding only 0.24% of federal contract funds to eligible veterans for the 2001 fiscal year. Pet. App. 4a. Indeed, the VA itself awarded only 0.1% of its contracts to eligible veterans in 2000, 0.2% in 2001, and 0.6% in 2002. *Id.* at 4a-5a.

Congress amended the Small Business Act in 2003, granting discretionary authority to federal contracting officers to award sole-source contracts of restricted dollar amounts to eligible service-disabled veterans or to restrict competition in accordance with the Rule of Two. 15 U.S.C. § 657f. This discretionary authority again failed to achieve the goal of the Small Business Act to award 3% of government contacts to eligible veterans. Only 0.605% of federal government contracts went to eligible veteran-owned small businesses in 2005. Pet. App. 5a.

Recognizing that the use of aspirational goals and discretionary authority had failed to provide

meaningful assistance to eligible veterans, Congress acted again in 2006, making the preference for veteran-owned small businesses in Section 8127(d) mandatory rather than discretionary. Congress focused the scope of these mandatory preferences to include only VA contracting opportunities, and expanded eligibility to include both small businesses owned by veterans generally, and small businesses owned by veterans with service-connected disabilities. See 38 U.S.C. § 8127(a), (d).

Congress' proposal met with resistance from the VA. The earliest version of H.R. 3082, as introduced in the House in 2005, included the term "shall" in the precursors to § 8127(b), (c), and (d). After a proposed amendment, the VA Deputy Secretary, Gordon Mansfield, testified before Congress in 2006 regarding the use of the terms "may" and "shall," and requested that the terms of the amendment be changed to eliminate the mandatory "shall."[3] Before passage, Congress amended the bill to allow VA discretion in subsections (b) and (c), but retained the mandatory "shall" in subsection (d). These provisions later were enacted into law as S.3421, and codified as 38 U.S.C. § 8127. These modifications of the legislative language show that Congress was well aware of the differences between "may" and "shall," and that these differences were intentional.

In *Hilton* v. *Sullivan*, 334 U.S. 323 (1948), this Court rejected an analogous argument against a statute that granted preferential treatment to veterans. There, this Court rejected a challenge to

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[3] *See* H.R. Rep. 109-592, at 35; *Legislative Hearing on H.R. 4791, Three Draft Bills, and a Proposed Amendment to H.R. 3082: Hearing before the H. Comm. on Veterans' Affairs, Subcomm. on Economic Opportunity*, 109th Cong. 58 (2006).

employment preferences for veterans, and, in doing so, highlighted that "witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written." *Id.* at 339. Given that testimony, the Court concluded that "Congress passed the bill with full knowledge that the long standing absolute retention preference of veterans would be embodied in the Act." *Id.*

Here, too, Congress adopted Section 8127(d) with full knowledge that the requirement that contracting officers "*shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans" imposed a mandatory mechanism in contrast to the discretionary standards in subsections (b) and (c). Congress' decision to chart a new course, providing that VA contracting officers "shall award" VA contracts to eligible veterans, reflects Congress' recognition that previous efforts had failed to achieve the desired results, and that stronger measures were necessary.

II. THE MANDATORY PREFERENCE IN SUBSECTION 8127(D) SERVES CONGRESS' GOAL OF INCREASING OPPORTUNITIES FOR VETERAN-OWNED BUSINESSES.

The United States has argued that Section 8127(d) should not be interpreted to impose a mandatory preference for veteran-owned businesses because doing so would "produce significant waste and inefficiency" and "could also create harmful delay." See Brief in Opposition 15-17. The United States continues that "[t]oday, a contracting officer can simply open the FSS website, check the listings, and place an order for such an item," whereas "on

petitioner's view, a contracting officer could not utilize the FSS without first performing market research to assess whether two or more veteran-owned small businesses can provide [an item] at a fair and reasonable price." *Id.* at 16.

The United States' focus on the administrative convenience to contracting officers is misguided. The intent of Congress under Section 8127 was to compel the VA to improve contracting opportunities for veteran-owned small businesses even if doing so might limit the discretion of contracting officers. See 38 U.S.C. § 8127(a)(1). The government's claims of "waste and inefficiency" are overblown, and, in all events, provide no basis for rejecting the mandatory mechanism of Section 8127(d).

A. Congress Sought To Address The Burdens Facing Veterans By Increasing Contracting Opportunities For Veteran-Owned Small Businesses.

1. Veterans' preferences traditionally are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to [public] service." *Personnel Adm'r of Mass.*, 442 U.S. at 265; *Attorney Gen.* v. *Soto-Lopez*, 476 U.S. 898, 910 (1986) (plurality) ("Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments"). The availability of adequate contracting opportunities for veterans and disabled veterans who own small businesses is critically important given the real-world challenges they face as they transition to civilian life.

During their military service, veterans gain significant leadership, management, and technical skills, and pursue educational opportunities, which are ideal preparation for success as entrepreneurs.[4] Nevertheless, among post-9/11 veterans, more than four-in-ten (44%) report that they had difficulties readjusting to civilian life. See Pew Study, *supra*, at 7. More than one-third (37%) say that they have suffered from some form of post-traumatic stress as a result of their experiences in the military, and nearly six-in-ten (58%) say that they have served with someone who did. *Id.* at 53. For veterans with a service-related injury, the transition to civilian life can be particularly challenging. Returning home means not only learning to live with a physical disability, but also the loss of his or her identity as an active member of the armed services.[5]

For all veterans, and especially those who have sustained service-related injuries, obtaining meaningful employment represents one of the best avenues for successfully reintegrating into their communities. See Ansley Testimony, *supra*. Unfortunately, many disabled veterans returning to

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[4] *Cf.* Pew Research Ctr., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era* 7 (2011) (Pew Study), *available at* http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf (noting that more than nine-in-ten post-9/11 veterans say that serving in the military has given them self-confidence, helped them mature, and taught them how to work with other people; more than seven-in-ten say that their military service helped prepare them for a post-military career).

[5] *See* Heather Ansley, Consortium of Citizens with Disabilities, Written Testimony before the United States Equal Employment Opportunity Commission: Overcoming Barriers to the Employment of Veterans with Disabilities (Nov. 16, 2011) (Ansley Testimony), http://www.eeoc.gov/eeoc/meetings/11-16-11/ansley.cfm.

the civilian workforce in the post-9/11 era have faced significant barriers to employment. According to the most recent Bureau of Labor Statistics data, the overall unemployment rate for disabled veterans is more than 50% higher than the unemployment rate for non-veterans.[6] For severely disabled post-9/11 veterans (*i.e.*, those with a disability rating of 60 percent or higher) the situation is worse as these veterans face an unemployment rate (11.4%) almost twice the rate for non-veterans (6.0%). See Employment Situation of Veterans—2014, *supra*, at tbl.7.

Although returning veterans have many traits that should make them attractive to employers—including discipline, leadership, training, and education—they also may have less civilian work experience than those who have not served in the military. Many veterans who would like to enter the civilian job market have found that non-veteran employers do not always understand the value of military experience or how it translates into civilian life, which limits employment opportunities for veterans. See Ansley Testimony, *supra*. Indeed, due to reliance on a professional, volunteer military, only about 0.5% of the American public has served on active duty at any time since 9/11—the lowest military participation rate since World War II. See Pew Study, *supra*, at 8.

2. The barriers facing veterans extend to government contracting. In a recent study commissioned by the Department of Defense (DOD), the RAND Corporation assessed obstacles to providing full and fair government contracting

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[6] *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Situation of Veterans—2014 tbl.7 (Mar. 18, 2015), *available at* http://www.bls.gov/news.release/pdf/vet.pdf.

opportunities to veterans.[7] The study revealed a lack of adequate contracting opportunities for veterans and service-disabled veterans.

First, some procurement officials give lower priority to meeting veteran contracting goals than to other small business preferences. See DOD Study, *supra*, at xi, 13. This de-emphasis of veteran contracting is due in part to historical reasons. See *id.* For example, when the Veterans Benefits Act of 2003 became law, it gave contracting officers discretion to set aside certain contracts for small businesses owned by service-disabled veterans. See Pub. L. No. 108-183, tit. III, § 308, 117 Stat. 2651, 2662 (2003) ("[A] contracting officer may award . . . ."). The DOD study found that some contracting officials continued to place a lower priority on contracting with service-disabled veteran-owned small businesses than with other small businesses already favored under other statutes. DOD Study, *supra*, at xi, 13.

Second, some contracting officials are reluctant to award contracts to veteran-owned small businesses because of a perception that such businesses may lack significant experience with federal contracting. See *id.* Accordingly, contracting officers often perceive such veteran-owned businesses to be less-attractive suppliers, since the contracting official may assume that more work and more risk are required to do business with them. See *id.* Similarly, some contracting officials surveyed in the DOD study acknowledged their reluctance to contract with a

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[7] *See* Amy G. Cox & Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses* iii (2013) (DOD Study), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

lesser known company when an incumbent contractor is available, thereby limiting opportunities for newly-formed small businesses owned by veterans. See *id.*

Finally, veteran-owned small businesses routinely struggle with a lack of resources necessary to compete for government contracts. See *id.* at 15. Due to the complexities of preparing bids for federal government contracts, bid and proposal costs for these contracts can be higher than what would be expected for private-sector contracts. The DOD study found that many veteran-owned small businesses were reluctant to bid for a government contract when they believed the contract was likely to go to an incumbent or another established supplier. See *id.*

3. In enacting the small business provisions of Section 8127, Congress sought to improve opportunities for veterans and service-disabled veterans to compete for contracts with the VA. Under the heading "Contracting Goals," Section 8127(a)(1) states that its purpose is "to increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1). And, as relevant here, to meet this goal, "a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans." *Id.* § 8127(d).

Not surprisingly, the same statutory goals are reflected in the legislative history of Section 8127. The House of Representatives explained that Section 8127 was intended to "improve the competitive status of small businesses owned by veterans and service-disabled veterans when competing for VA contracts."

H.R. Rep. No. 109-592, at 14.[8] The House Report noted frustration with the efforts by agencies to create contracting opportunities for veterans, and the perceived "culture of indifference or ignorance" among some procurement officials with regard to the need to promote veteran participation in the federal procurement system. *Id.* at 15-16.

Section 8127 was intended to remedy these failings by ensuring that "small businesses owned and controlled by veterans and service-disabled veterans should routinely be granted the primary opportunity to enter into VA procurement contracts, and would encourage other agencies to provide such preferences to veteran and service-disabled veteran owned small businesses." *Id.* at 14-15. The House Report further

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[8] Committee hearings on the legislation highlighted the challenges faced by veterans, the failures of previous legislation, and the importance of increasing opportunities for veterans to compete for government contracts. *See, e.g., H.R. 1773, The Native American Veteran Home Loan Act; H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005; and Four Draft Bills: Hearing Before the H. Comm. on Veterans Affairs, Subcomm. on Economic Opportunity*, 109th Cong. 11 (2005) (statement of Carl Blake, Paralyzed Veterans of America) (explaining that federal agencies "generally ignore" contracting goals "because they know that no real sanctions can be levied against them"); *id.* at 17 (statement of John K. Lopez, Association for Service Disabled Veterans) (describing H.R. 3082 as a "specified contribution to the continuing obligation of our Nation to rehabilitate those veterans that sacrifice for our Nation's security and prosperity"); *Legislative Hearing on H.R. 4791, Three Draft Bills, and a Proposed Amendment to H.R. 3082: Hearing Before the H. Comm. on Veterans' Affairs, Subcomm. on Economic Opportunity*, 109th Cong. at 27 (statement of Brian E. Lawrence, Disabled American Veterans) ("No other category of business owner has contributed more to our nation or is more deserving of special consideration for federal contract opportunities than disabled veterans").

explained that the 2006 Act was necessary, in part, because prior legislation establishing discretionary goals for contracting by small businesses owned by veterans had failed meaningfully to increase contracting opportunities for these businesses. Indeed, in 2005, just prior to the passage of the Act, total federal agency contracting with such veteran-owned businesses amounted to only 0.605 percent of federal contracting, despite a government-wide goal of 3.0 percent. *Id.* at 15-16.

Section 8127 reflects Congress' intention that the VA would (1) take the lead in removing barriers and improving contracting opportunities for veteran-owned businesses and (2) "set the example among government agencies" with regard to veteran contracting. *Id.* at 16. Put simply, Congress' policy goals in enacting Section 8127 were directed at improving contracting opportunities by veteran-owned small businesses rather than the administrative convenience of contracting officers.

B. The Alleged Burden On Contracting Officers Is Overstated And Does Not Provide A Basis For Ignoring Congressional Intent.

The United States argues that it would unreasonable to interpret subsection (d) as imposing a mandatory mechanism on contracting officers because it would "produce significant waste" and be "markedly less efficient" than simply allowing a contracting officer to "place an order for such an item" without regard to the prospective contractor's veteran status. See Brief in Opposition 15-17. These policy concerns about the burden imposed on contracting officers are overblown and provide no basis for ignoring Congress' goal to increase

contracting opportunities for veteran-owned small businesses.

1. The United States' claims of administrative burden and excessive waste are overstated.

The government has argued that imposition of a mandatory mechanism under Section 8127(d) would require a contracting officer to conduct "market research to assess whether two or more veteran-owned small businesses can provide a griddle at a fair and reasonable price." Brief in Opposition 16. These alleged claims about the burdens of performing "market research" are exaggerated.

At the outset, under Section 8127, the VA is already required to maintain a database of registered, pre-verified small businesses owned by veterans. 38 U.S.C. § 8127(f)(1). This database is known as the VA's *Vendor Information Pages* (VIP), and it is publicly available at http://www.vip.vetbiz.gov. 38 C.F.R. § 74.1; *see also In & Out Valet*, B-411019, 2015 CPD ¶ 128, at n.1 (Comp. Gen. Apr. 15, 2015). The VIP database can be searched by business name, keyword, location, and industry to identify veteran-owned small businesses that might be candidates to compete for a particular contract. Under Section 8127, only veteran and service-disabled veteran owned businesses that are listed in the VIP database are eligible to compete for set-aside contracts. See 38 U.S.C. § 8127(e). As a result, contracting officers need not research whether other veteran-owned sources are available. Indeed, under the VA's procurement regulations, contracting officers already must use the VIP database to conduct market research as part of the procurement planning process. See 48 C.F.R. § 810.001.

Contracting officers have access to numerous other resources to perform the market research required under subsection (d). For example, the VA can choose to post a "Request for Information" or "Source Sought" notice on the government's Federal Business Opportunities website to gauge the interest of veteran-owned small businesses in competing for a particular contract. Indeed, the VA routinely posts such notices on this website for exactly this purpose.[9]

In addition, agencies have discretion in determining the scope of market research that is necessary before deciding whether a contract must be set aside for competition restricted to veteran-owned small businesses. The Government Accountability Office (GAO) has explained that "[t]he requirements of the 2006 VA Act [*i.e.*, Section 8127] do not dictate the use of any particular methodology in assessing the availability of [veteran-owned small businesses] to perform a requirement." *In & Out Valet Co.*, 2015 CPD ¶ 128; *accord Crosstown Courier Serv., Inc.*, B-407404, 2012 CPD ¶ 333 (Comp. Gen. Nov. 30, 2012). Accordingly, a contracting officer's decision whether two or more veteran-owned businesses are likely to bid "is a matter of informed business judgment within the contracting officer's discretion," and the GAO will not disturb the contracting officer's decision "absent a showing that it was unreasonable." *In & Out Valet Co.*, 2015 CPD ¶ 128.[10]

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[9] *See, e.g.*, Dep't of Veterans Affairs, *Doing Business with VA* (2015), *available at* http://www.va.gov/osdbu/docs/DoingBusinessWithVA_ReferenceGuide.pdf (encouraging small businesses to respond to Requests for Information to identify potential vendors).

[10] *Accord Buy Rite Transp.*, B-403729 et al., 2010 CPD ¶ 245 (Comp. Gen. Oct. 15, 2010); *Crosstown Courier Serv., Inc.*, B-410936, 2015 CPD ¶ 107 (Comp. Gen. Mar. 12, 2015).

Further, in practical application, the market research requirement under subsection (d) is flexible and can be satisfied with efforts that are reasonable in relation to the nature of the procurement. For example, in *In & Out Valet Co.*, 2015 CPD ¶ 128, the GAO held that the VA had done reasonable market research before not setting aside a contract for a veteran-owned small business where the contracting officer searched the VIP database to identify potential contractors and then researched the firms' websites to determine whether they performed the required services. See also *Crosstown Courier Servs., Inc.*, 2012 CPD ¶ 333 (holding that VA's market research was reasonable where the contracting officer searched the VIP database for potential veteran-owned contractors); *Buy Rite Transp.*, B-403729 et al., 2010 CPD ¶ 245 (Comp. Gen. Oct. 15, 2010) (holding that the VA's market research was reasonable where the contracting officer searched the VIP database and relied on his knowledge that the VA had received bids from veteran-owned small businesses in response to a related procurement).[11]

Given the existing tools at the VA's disposal, the flexibility of Section 8127 regarding the type and degree of market research that is necessary, and the GAO's deference to the business judgment of the contracting officer in determining what type of

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[11] *See also FlowSense, LLC*, B-310904, 2008 CPD ¶ 56 (Comp. Gen. Mar. 10, 2008) (holding that market research was reasonable where the contracting officer searched the VIP database and other available databases to assess whether multiple small businesses owned by service-disabled veterans were likely to bid); *Crosstown Courier Serv., Inc.*, 2015 CPD ¶ 107 (holding that market research was reasonable where the contracting officer searched the VIP database, the General Services Administration website, and a Small Business Administration database).

market research is necessary for each procurement, there is no merit to the government's assertion that it would be unduly burdensome or inefficient for the VA to comply with subsection (d) as written.

Finally, application of Section 8127(d) in accordance with its terms would not result in "significant waste." Brief in Opposition 15. Section 8127(d) requires contracting officers to award contracts to small businesses owned by veterans only if "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d); see also 48 C.F.R. § 819.7005(c) (authorizing the contracting officer to cancel the set-aside requirement where the prices that are actually offered are not reasonable). See, e.g., *Crosstown Courier Serv., Inc.*, 2015 CPD ¶ 107 (sustaining VA decision not to set aside contract where pricing received from veteran-owned small business for similar procurement resulted in bids that were between 212% and 163% higher than the VA's estimate of fair market value for the services). Accordingly, there is no merit to the government's suggestion that providing fair contracting opportunities for veterans in all procurements, as required by subsection (d), would be wasteful or harmful to the public fisc. See Brief in Opposition 15-16.

2. The government's complaints about the alleged burdens imposed on contracting officers are, in all events, irrelevant in this proceeding.

In enacting Section 8127(d), Congress determined that improving contracting opportunities for veterans—including service-disabled veterans—was an important national policy goal, which outweighed any additional administrative requirements that would be placed on the VA. To the extent that the

United States believes that Congress made the wrong policy choice, that policy argument is best directed to Congress, not the Court. See *Hilton*, 334 U.S. at 339 (upholding veteran employment preference and explaining that the Court's "responsibility is to interpret the Act, not to overrule the congressional policy").

In enacting legislation, Congress often faces a difficult task of balancing the disparate interests of different parties, including those of the government. See, *e.g.*, *United States* v. *Gilman*, 347 U.S. 507, 511-12 (1954) ("[Congress's] selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised."). In so doing, Congress appropriately may adopt a policy that imposes new obligations on an executive agency to achieve an important policy goal. See, *e.g.*, *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 123 (1980) ("[A]ny increased burdens imposed on the [agency] as a result of its compliance with [the statute] were intended by Congress in striking an appropriate balance between the interests of [the stakeholders]."); *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 843 (1983) ("[A]ny impediment that our holding places in the path of the [government] is one that Congress chose to adopt.").

Where Congress has enacted legislation that balances competing policy interests, it is not for a federal agency or a federal court to substitute its judgment for that of Congress. See *Salazar* v. *Buono*, 559 U.S. 700, 717 (2010) (plurality) ("Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations."); *accord Eldred* v. *Ashcroft*, 537 U.S.

186, 208 (2003). Indeed, this Court has routinely rejected arguments by agencies that compliance with a congressional mandate would be unduly burdensome or that a different policy would be more desirable. See, *e.g.*, *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218, 234 (1994) ("[O]ur estimations, and the [government's] estimations, of desirable policy cannot alter the meaning of the [statute]."); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (holding that the Court's role was to "determine what Congress intended" in the statute, notwithstanding the government's argument that a different policy would be more efficient); *Consumer Prod. Safety Comm'n*, 447 U.S. at 123 ("[P]etitioner's claim that . . . compliance with the requirements of [the statute] will impose undue burdens on the Commission is properly addressed to Congress, not to this Court.").

As discussed above, the natural reading of the language of Section 8127(d) requires the VA to award contracts to veteran-owned businesses "if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Congress imposed this mandatory mechanism based on its desire to increase contracting opportunities for small veteran-owned businesses. *Id.* § 8127(a)(1). In so doing, Congress was aware that increasing veteran contracting opportunities would impose additional administrative responsibilities on the agency, see H.R. Rep. No. 109-592, at 16-17; however, Congress determined that the need to honor the service of veterans and assist in their transition to civilian life was a national priority, which justified the mandatory preference in Section

8127(d). See *Hilton*, 334 U.S. at 339 ("Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act").

To the extent that the VA believes the set-aside requirement may be "less efficient," it is nonetheless required to comply with the congressional mandate until Congress directs otherwise. See *Manhattan Gen. Equip. Co.* v. *Comm'r*, 297 U.S. 129, 134 (1936); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) If the VA believes that subsection (d) should be changed to provide additional discretion to contracting officers, that policy view is best directed to Congress rather than the Court. See, *e.g.*, *Bowsher*, 460 U.S. at 843 ("[A]ny arguments that this situation should be changed must be addressed to Congress, not the courts."); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 n.12 (1976) (holding that the government's "policy arguments" were "more appropriately addressed to Congress than to this Court.").

CONCLUSION

For these reasons, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 29, 2015
CERTIORARI GRANTED JUNE 22, 2015

TABLE OF CONTENTS

Page

Docket Entries
No. 12-173 (Fed. Cl.) 1
No. 2013-5042 (Fed. Cir.) 4

Notice from Jan R. Frye to All VA Acquisition and Procurement Officials/Personnel, Oct. 17, 2011 6

Department of Veterans Affairs News Release, Oct. 28, 2011 8

Letter from Dennis Foley to Lynn H. Gibson, Feb. 16, 2012 11

Letter from Dennis Foley to Cherie Owen, Apr. 12, 2012 13

Government Accountability Office, Comptroller General of the United States, Decision, May 30, 2012 16

Amended Complaint, dated June 3, 2012 (excerpts) 20

Parties' Joint Stipulation of Facts, Sept. 4, 2012 30

Letter from Andrea M. Gardner-Ince to Timothy Barton, Sept. 5, 2012 33

Parties' Joint Status Report, Dec. 10, 2012 35

Order for Entry of Judgment, Dec. 12, 2012 37

Government Accountability Office, Comptroller General of the United States, Decision, Dec. 13, 2012 38

Letter from Robert C. Bigler to Federal Circuit, Mar. 18, 2014 (with attachments) 42

TABLE OF CONTENTS—Continued

Page

Letter from Lauren B. Fletcher to Federal Circuit, Apr. 2, 2014 56

DOCKET ENTRIES
NO. 12-173 (FED. CL.)*

Date Filed	#	Docket Text
03/15/2012	1	COMPLAINT against USA (VA) ... filed by KINGDOMWARE TECHNOLOGIES, INC. ...
		* * *
04/09/2012	6	MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA. ...
		* * *
06/04/2012	11	RESPONSE and reply to 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by KINGDOMWARE TECHNOLOGIES, INC. ...
06/21/2012	12	REPLY to Response to Motion re 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA.
07/18/2012	13	ORDER Plaintiff's Motion to File Amended Complaint granted. ...
08/01/2012	14	RESPONSE to 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by KINGDOMWARE TECHNOLOGIES, INC. ...
		* * *
08/06/2012	16	REPLY to Response to Motion re 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA.

* Entries edited for brevity and clarity.

* * *

08/21/2012	18	ORDER granting 6 Motion to Dismiss—Rule 12(b)(1) plaintiff's claims for prospective declaratory and injunctive relief. ...

* * *

09/04/2012	21	STIPULATION of Facts, filed by USA.
09/18/2012	22	MOTION for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC. ...
10/09/2012	23	CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by USA. ...

* * *

10/23/2012	28	RESPONSE and reply to 23 CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by KINGDOMWARE TECHNOLOGIES, INC. ... Modified on 10/25/2012—corrected response.
10/26/2012	29	REPLY to Response to Motion re 23 CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by USA.

* * *

11/27/2012	30	PUBLISHED OPINION denying 22

		Plaintiff's Motion; granting 23 Defendant's Cross-Motion. Joint Status Report due by 12/10/2012. ...
12/10/2012	31	JOINT STATUS REPORT, filed by USA.
12/12/2012	32	UNPUBLISHED OPINION and ORDER. For the reasons identified in the November 27, 2012 opinion (ECF No. 30), the Clerk of the Court is directed to enter judgment pursuant Rule 54(b) for defendant as to all three procurements identified in plaintiff's amended complaint. Each party to bear its own costs. ...
12/18/2012	33	JUDGMENT entered pursuant to Rule 58, that judgment is in favor of defendant as to all three pf the procurements identified in plaintiffs amended complaint. Each party shall bear its own costs. ...
01/10/2013	34	NOTICE OF APPEAL as to 33 Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC. ...

* * *

DOCKET ENTRIES
NO. 2013-5042 (FED. CIR.)*

01/15/2013	1	Appeal docketed. ...
		* * *
09/04/2013	24	BRIEF FILED for Appellant Kingdomware Technologies, Inc. [23]. Title: Brief for Plaintiff-Appellant Kingdomware Technologies, Inc., [Non-Confidential version only]. ...
		* * *
11/22/2013	37	BRIEF FILED for Appellee US [36]. Title: Brief for Defendant-Appellee, The United States, [Non-Confidential version only]. ...
		* * *
12/20/2013	40	BRIEF FILED for Appellant Kingdomware Technologies, Inc. [39]. Title: Reply Brief for Plaintiff-Appellant Kingdomware Technologies, Inc., [Non-Confidential version only]. ...
		* * *
03/07/2014	48	Submitted after ORAL ARGUMENT by Lauren B. Fletcher for Kingdomware Technologies, Inc. and Mr. Robert C. Bigler for US. Panel: Judge: Prost , Judge: Clevenger , Judge: Reyna.

* Entries edited for brevity and clarity.

03/18/2014	49	Letter from Appellee US Veteran-owned small business contracting goals. ...
04/02/2014	50	Letter from Appellant Kingdomware Technologies, Inc. in response to March 18, 2014 letter from Appellee. ...
06/03/2014	51	OPINION and JUDGMENT filed. The judgment or decision is: Affirmed. (Precedential Opinion). (For the Court: Prost,Chief Judge; Clevenger,Circuit Judge and Reyna,Circuit Judge). Reyna, Circuit Judge, dissenting.

* * *

07/18/2014	53	Petition for en banc rehearing filed by Appellant Kingdomware Technologies, Inc. ...

* * *

08/05/2014	61	RESPONSE of Appellee US to the petition for en banc rehearing [53] filed by Appellant Kingdomware Technologies, Inc. in 13-5042. ...

* * *

09/10/2014	66	ORDER filed denying [53] petition for en banc rehearing filed by Kingdomware Technologies, Inc.. By: En Banc (Per Curiam). ...
09/17/2014	67	Mandate issued to the United States Court of Federal Claims. ...

* * *

NOTICE FROM JAN R. FRYE TO ALL VA ACQUISITION AND PROCUREMENT OFFICIALS/PERSONNEL

October 17, 2011

TO: All VA Acquisition and Procurement Officials/Personnel

SUBJ: Recent Government Accountability Office Decision Involving the Use of the Federal Supply Schedule Program vs. VA's Veterans First Contracting Program

1. On January 7, 2010, VA implemented those portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Sections 502 and 503 of Public Law 109-461 (the Act) providing opportunities for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) to increase their federal contracting and subcontracting (74 Federal Register 64619 (December 8, 2009)). Under this final rule, commonly referred to in VA as the "Veterans First Contracting Program," a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implemented these special acquisition methods as a change to the VA Acquisition Regulation (VAAR). Therein, in response to public comments and to a comment from the General Services Administration as to the applicability of the VA's new SDVOSB/VOSB set-aside program to acquisitions conducted pursuant to the Federal Supply Schedule, VA responded that the law and VA's implementing regulations do not apply to FSS procurements.

2. Nevertheless, the Government Accountability Office (GAO) issued a bid protest decision October 11,

2011, in the case of Aldevra, a SDVOSB, case number B-405271 and B-405524, which recommends VA take corrective action on two acquisitions conducted pursuant to FAR Subpart 8.4, Federal Supply Schedule. The corrective action would require VA to conduct market research to determine if two or more SDVOSBs could perform the work, and, if so, setting-aside the acquisition for SDVOSBs on the open market based on GAO's interpretation of the VAAR, before VA could use the Federal Supply Schedules Program. VA is of the opinion GAO's interpretation is flawed and legally incorrect.

3. The United States Supreme Court ruled in 1986 the Comptroller General is an officer of the Legislative Branch (see Bowsher v. Synar, 478 US. 714, 727-32), holding the Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power. Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice.

4. Therefore, VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission.

5. *Please do not reply to this e-mail message.* Questions regarding this matter should be directed to your respective District Counsel or head of contracting activity. Thank you.

Jan R. Frye
Deputy Assistant Secretary for Acquisition and Logistics

DEPARTMENT OF VETERANS AFFAIRS
NEWS RELEASE

FOR IMMEDIATE RELEASE
October 28, 2011

Statement on VA Veteran-Owned Small Business Contract

"The Department of Veterans Affairs (VA) conducts its contracting with small businesses in good faith and in the spirit of the "Veterans First" legislation that gives preference to eligible Veteran-owned small businesses (VOSBs) and service-disabled Veteran-owned small businesses (SDVOSBs). This law gave VA new authority "for purposes of meeting [its] goals" for contracting with these firms, and VA is complying by exceeding those goals. VA will continue to strongly support eligible Veteran-owned small businesses who seek to do business with the federal government.

It is VA's position that procurement professionals should continue to use the Federal Supply Schedules Program as one of the many contracting vehicles available to meet the needs of the Department. The GAO recommendation does not change how VA will acquire goods and services in support of its mission. VA expects this issue ultimately will be decided by the courts. Since the June 2007 effective date, VA has consistently interpreted the law as a small business set aside program with Veteran small businesses having priority over any other class of small business when conducting full and open competition contracts.

VA again specifically explained that 'this rule does not apply to Federal Supply Schedule task or delivery orders' when promulgating the final rule (74 Federal Register 64619 (December 8, 2009)), implementing the

portions of the Veterans Benefits, Healthcare, and Information Technology Act of 2006 (Public Law 106-491) providing opportunities for SDVOSBs and VOSBs to increase their contracting and subcontracting with VA."

Background

On October 11, 2011, the U.S. Government Accountability Office (GAO) issued a decision upholding a bid protest by an SDVOSB on two solicitations for the purchase of food-preparation equipment. VA has 65 days in which to formally respond to GAO's recommendations, which are currently under review.

VA leads the federal government in contracting with SDVOSBs. In fiscal year (FY) 2010, VA awarded $3.5 billion to VOSBs, of which $3.1 billion went to SDVOSBs, out of a contracting base of $15.4 billion. These awards represent 23% to VOSBs and 20% to SDVOSBs, and greatly exceed VA's goals of 12% and 10%, respectively. This performance also exceeds the government-wide SDVOSB goal of 3%. When VA buyers make purchases through the FSS program, awards to SDVOSBs and VOSBs also count toward these goals—not just awards made through formal set-asides. In FY2010, approximately 12% of VA's total VOSB/SDVOSB spending included firms holding FSS contracts.

VA, in conjunction with the General Services Administration (GSA), encourages VOSBs and SDVOSBs to consider participating in the FSS Program. The FSS Program is the primary vehicle the Federal Government uses in making purchases for commercially available products and services: medically related products and services at VA, and other products and services through GSA. Both agencies' FSS Programs are mul-

tiple award contracting programs that are open for potential new contractors on a continuing basis. The VA and GSA FSS web portals which can assist potential contractors in determining if this program is right for them can be found at http://www.fss.va.gov/ and http://www.gsa.gov/portal/category/100611 respectively.

###

LETTER FROM DENNIS FOLEY TO LYNN H. GIBSON

FEB 16 2012

Ms. Lynn H. Gibson
General Counsel
U.S. Government Accountability Office
441 G. Street
Washington, DC

In Reply Refer To: 025E

In re: B-405727

Dear Ms. Gibson:

The Department of Veterans Affairs (VA) is in receipt of the Government Accountability Office's (GAO) decision and your letter dated on or about December 27, 2011, in the above-subject bid protest case which sustained the bid protest of Kingdomware Technologies on solicitation No. VA-261-11-RQ-1514. GAO's recommendation was as follows:

> RECOMMENDATION
>
> We recommend that the agency conduct reasonable market research regarding its requirements. If as a result of this research the VA determines that there are two or more SDVOSB concerns capable of performing the requirement, the agency should cancel the award and resolicit its requirement as a set aside for SDVOSBs. We also recommend that. the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. §21.8(d)(1) (2011). Kingdomware's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. *Id.* §21.8(f)(1).

Kingdomware Technologies, B-405727, December 19, 2011, B-405524, 2011 CPD ¶ 283.

As this decision is based on GAO's holding in *Aldevra*, B-405271, B-405524, October 11, 2011, 2011 CPD ¶ 183, VA respectfully declines to fellow the Recommendation for the reasons set forth in VA's agency report filed January 4, 2012, in response to protest file number B-406205.

Sincerely,

/s/
Dennis Foley
Deputy Assistant General Counsel (025E)
Department of Veterans Affairs
Office of General Counsel 025
801 Vermont Ave., N.W.
Washington, D.C. 20420
(202) 461-4998 Phone
(202) 273-9384 Fax

cc: Latonya Barton
Kingdomware Technologies

LETTER FROM DENNIS FOLEY TO CHERIE OWEN

APR 12 2012

U.S. Government Accountability Office
*Procurement Law Control Group In Reply Refer To:
441 G Street, N.W.
Washington, D.C. 20548

Attn: Cherie Owen, Esq.

Dear Ms. Owen:

The Department of Veterans Affairs (VA) hereby files this Agency Report in response to the bid protest of Kingdomware Technologies ("Protester"). This matter concerns VA's contract award VA-245-12-F-0622 via an optional use Federal Supply Schedule (FSS) contract for an emergency notification system that will allow communication with VA's anywhere, anytime, via any communication method at the VA Medical Center, Baltimore, MD. (Enclosure). The Protester alleges that the requirement should have been considered and conducted as a set-aside for service-disabled, Veteran-owned small businesses (SDVOSBs) pursuant to 38 U.S.C. 8127-8128, as implemented in VA Acquisition Regulation Part 819. Your file number is B-406507.

VA acknowledges that GAO has previously opined on this specific legal issue in *Aldevra*, B-405271, B-405524, 2011 CPD ¶ 183; *Kingdomware*, B-405727, 2011 CPD ¶ 283; and *Aldevra*, B-406205, 2012 CPD ¶ 112. VA also notes the recent decision in *Alternative Contracting Enterprises, LLC; Pierce First Medical* ("*ACE*"), B-406343, [case numbers omitted], March 26, 2012, which dealt with the application of VA's SDVOSB statute and regulation in relation to the AbilityOne contracting program. In each case, VA made the same argument, that VA had the authority, as the sole im-

plementing agency, to interpret the statute, and in so doing, set forth in the implementing regulation that the SDVOSB/VOSB set-aside program did not impact and was not applicable to either the FSS or the AbilityOne contracting program. GAO distinguishes the two sets of cases in footnote 8 of *ACE* as follows:

> We recognize that we recently found that 38 U.S.C. §8127(d) unambiguously required that the VA set aside procurements for SDVOSB or VOSB concerns where there was a reasonable expectation that two or more such concerns would submit offers and award could be made at a fair and reasonable price. *See Aldevra*, Mar. 14, 2012, 2012 CPD ¶___ at 5; *Kingdomware Technologies*, B-405727, Dec. 19, 2011, 2011 CPD ¶283 at 4; and *Aldevra*, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶183 at 3. The facts in the *Kingdomware* and *Aldevra* cases are inapposite to the current protests because those protests involved the interpretation of the VA Act without reference to other statutory preferences.

VA finds no rational basis for such a distinction since both lines of cases center on the interpretation of VA's statute and legislative history which make no reference to the other authorities. VA acted, as was legally appropriate to do so, by interpreting VA's statute in conjunction with the entire procurement system in notice and comment rulemaking and determined that neither FSS acquisitions nor the AbilityOne program were impacted by VA's SDVOSB/VOSB set-aside authority. VA finds no need to restate the detailed arguments previously filed at GAO. Further, since VA conducted a FSS acquisition, where SDVOSB set-asides are discretionary (see FAR 8.405-5), VA asserts that it is ir-

relevant whether VA conducted market research to determine whether two or more small businesses of any type were capable of bidding on the requirement.

VA finds no legal question at issue in this protest other than Protester's contention that VA is required to perform market research and conduct SDVOSB set-asides, when otherwise appropriate, i.e., Rule of Two, prior to considering use of the FSS. Therefore, with regard to *Aldevra* and its progeny, VA has informed the GAO, and will continue to do so, that VA shall not follow these recommendations. As you are no doubt aware, the Comptroller General is an officer of the legislative Branch. *See Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power). "Because GAO is part of the legislative Branch, Executive Branch agencies are not bound by GAO's legal advice." Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of legal Counsel, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 11, 2005) ("Bradbury Memo") (citing *Bowsher*, 478 U.S. at 727-32).

Respectfully,

/s/

Dennis Foley
Deputy Assistant General Counsel

Enclosure

GOVERNMENT ACCOUNTABILITY OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, DECISION

Matter of: Kingdomware Technologies

File: B-406507

Date: May 30, 2012

* * *

DECISION

Kingdomware Technologies of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, protests the Department of Veterans Affairs (VA) award of contract No. VA-245-12-F-0622 to Everbridge, Inc. to provide employee emergency notification services.[1] Kingdomware asserts that the agency failed to comply with the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations, with regard to setting aside procurements for SDVOSB (or veteran-owned small business (VOSB)) concerns.

We sustain the protest.

This procurement was conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures, set forth at Federal Acquisition Regulation (FAR) subpart 8.4. Kingdomware asserts that the VA acted improperly by using non-mandatory FSS procedures and awarding a contract to a non-

---

[1] The protester contends that no solicitation number was issued because the agency did not advertise the requirement prior to making the award. Protest at 4. The agency has not disputed this assertion.

SDVOSB company, rather than setting aside the procurement for SDVOSB concerns. Kingdomware further asserts that the agency's own market research established that there were "at least 20 SDVOSB [concerns]" (including Kingdomware) that hold FSS contracts for the acquired services; yet, the agency awarded the contract to a non-SDVOSB concern.

The VA has responded to Kingdomware's protest by repeating arguments it has previously made in connection with a prior protest regarding SDVOSB concerns. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112. In that decision we sustained a protest challenging the VA's actions with regard to an FSS procurement in which, as here, the protester asserted that the agency failed to comply with the requirements of the VA Act and its implementing regulations.

Specifically, in Aldevra, we noted that the VA Act provides that:

> ... a contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (2006).

There, as here, the VA argued that, notwithstanding the VA Act, the agency need not consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program.

We disagreed on the basis that the plain language of the VA Act mandates that the VA "shall" conduct its procurements, including FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price. Aldevra, supra, at 5.

Here, the VA asserts that it "finds no legal question at issue in this protest other than [Kingdomware's] contention that VA is required to perform market research and conduct SDVOSB set-asides ... prior to considering use of the FSS." Agency Report, Apr. 12, 2012, at 2. As it has previously, the VA maintains that FSS acquisitions "[are not] impacted by VA's SDVOSB/VOSB authority." Id. Further, the VA does not dispute Kingdomware's assertion that the VA, in fact, conducted market research in connection with this procurement and found that there were at least 20 SDVOSBs that could perform the requirements at issue. Rather, the VA asserts that "it is irrelevant whether VA conducted market research to determine whether two or more small businesses of any type were capable of bidding on the requirement" maintaining that SDVOSB set-asides are discretionary under any FSS acquisition. Id.

For the same reasons we discussed at length in Aldevra, we reject the VA's arguments. In addition, it appears that, here, the agency conducted market research prior to the acquisition and found that at least 20 SDVOSB concerns were capable of meeting the requirements at issue. Specifically, in an email to Kingdomware dated March 12, 2012, the agency stated the FSS schedule under which this procurement was conducted "includes 541 vendors," and acknowledged that "20 of those are SDVOSBs." Protest, Tab 4, Email

from Contract Specialist to Kingdomware, Mar. 12, 2012.

Consistent with our decision in Aldevra, supra, we conclude that the VA Act required the agency to consider whether this acquisition should have been set aside for SDVOSB (or VOSB) concerns. Further, on the record presented, it appears that such set-aside should have occurred. Accordingly, we sustain Kingdomware's protest.

RECOMMENDATION

We recommend that the agency confirm the market research it previously conducted. In the event such research confirms that two or more SDVOSB concerns are able to meet the requirements at a reasonable price, we recommend that the agency cancel the contract to Everbridge and re-solicit the requirement as an SDVOSB set-aside. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). Kingdomware's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

AMENDED COMPLAINT, DATED JUNE 3, 2012 (EXCERPTS)

* * *

NATURE OF THE ACTION

1. Plaintiff brings this action for declaratory and injunctive relief against defendants United States of America, United States Department of Veterans Affairs ("DVA"), and chief executive of that agency, Gen. ERIC K. SHINSEKI in his representative capacity. Plaintiff seeks to compel the DVA to comply with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§8127 and 8128 ("Veterans First Contracting Program"), by requiring DVA to conduct reasonable market research before proceeding with an acquisition of supplies or services to determine if there is a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States, and if such a determination is made, to set aside the acquisition of the supplies or services for competition limited to veteran owned small businesses.

* * *

THE PARTIES

4. Plaintiff is a Delaware corporation residing in Maryland and is certified as a Service Disabled Veteran Owned Small Business by the DVA.

* * *

STATUTORY AND REGULATORY FRAMEWORK

7. The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§8127 and 8128 ("Veterans First Contracting Program") require that DVA conduct reasonable market research to determine if there is an expectation that there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

8. If a determination is made that there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States, then a contracting officer must set aside the acquisition of the supplies or services for competition limited to veteran owned small businesses. 38 U.S.C. §8127(d). The Veterans First Contracting Program applies only to the acquisition of supplies or services by the DVA.

9. The Federal Acquisition Regulation (FAR), is applicable to all federal agencies, including the DVA. Part 10 requires that an agency conduct market research "to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services," 48 C.F.R. §10.000, prior to soliciting offers for supplies or services. The regulation sets forth procedures for conducting market research. 48 C.F.R. §10.002.

10. The FAR sets forth a priority for the acquisition of supplies and services from or through Govern-

ment supply sources. 48 C.F.R. §8.002. This regulation provides that "[E]xcept ... as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority." The list in order of priority is: agency inventories, excess from other agencies, Federal Prison Industries, Inc., the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, Wholesale supply sources, such as stock programs of the General Services Administration, Mandatory Federal Supply Schedules, Optional use Federal Supply Schedules; and Commercial sources (including educational and nonprofit institutions).

11. The Veterans First Contracting Program changed the priority of DVA's acquisition of supplies and services. The new priority for the DVA puts awards to service disabled veteran owned small businesses and then veteran owned small business first and second. 38 U.S.C. §§8127(i)(1) and (2) and 8128.

12. The DVA has refused to follow the order of priority established by the Veterans First Contracting Program and is following the order of priority established in FAR Part 8 even when the prerequisites of 38 U.S.C. §8127(d) are met.

13. The DVA continues to satisfy its requirements for supplies and services through use of the GSA's Federal Supply Schedule without first conducting reasonable market research to determine if there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

14. The DVA continues to satisfy its requirements for supplies and services through use of the delegation to DVA to use the Federal Supply Schedule for certain medical supplies without first conducting reasonable market research to determine if there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

15. The Veterans First statute also establishes a requirement that a business claiming to be a legal Service Disabled Veteran Owned Small Business must be certified as a Service Disabled Veteran Owned Small Business by the DVA and must appear on a database maintained by the DVA before it can be awarded a contract as a Service Disabled Veteran Owned Small Business. 38 U.S.C. §8127(f).

16. The DVA maintains a listing of all businesses which have been certified as Service Disabled Veteran Owned Small Business. 38 U.S.C. §8127(f). This list appears on the DVA website as the Vendor Information Pages (VIP). Found at www.vetbiz.gov.

17. GSA's FSS includes large as well as small businesses. When DVA fulfills its requirements through the use of GSA's FSS when the conditions of 38 U.S.C. §8127(d) are met it irreparably harms veteran owned small businesses because it makes them compete against large businesses and non-veteran owned businesses instead of small veteran owned businesses as intended by Congress.

18. Once an acquisition of supplies or services is satisfied using the FSS that contracting opportunity is

no longer available to veteran owned small businesses until the contract expires.

19. On October 11, 2011, the Government Accountability Office ruled in two bid protests, *Aldevra*, B-405271 and B-405524, that DVA violated the Veterans First Contracting Program and improperly used the FSS rather than setting-aside acquisitions for veteran owned small businesses and recommended that it cancel an award and re-solicit using a SDVOSB set-aside. In the second protest GAO recommended that DVA conduct reasonable market research to determine if there were two SDVOSBs capable of meeting its requirements and, if there were, that DVA re-solicit the requirement using a SDVOSB set-aside.

20. On October 20, 2011 DVA's Deputy Assistant Secretary for Acquisition and Logistics sent an e-mail to all of DVA's acquisition and procurement personnel stating that

> "VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission."

21 On October 28, 2011 DVA issued a press release announcing that it would not follow the recommendations by GAO in the *Aldevra* protests. It directed DVA personnel to continue using GSA's FSS program as they had in the past.

22. The DVA has regularly and routinely awarded contracts for goods and services using the priorities in FAR Part 8 rather than the priorities in the Veterans First Contracting Program.

23. Kingdomware alone has filed at least nine Veterans First protests with GAO alleging that the DVA had violated the provisions of 38 U.S.C. §8127(d). Among these are:

(a) GAO No. 405727 included in this Complaint as Claim for Relief One.

(b) GAO No. 405596—Kingdomware filed a protest with GAO on August 24, 2011 concerning solicitation VA-261-11-RQ-0796 alleging that the DVA had not conducted proper market research to determine if there were at least two SDVOSBs which could be expected to submit reasonable prices to perform the work. The protest recited facts that showed that at least two SDVOSBs had expressed an interest in submitting an offer in response to the solicitation. Despite this, the contracting office did not set the solicitation aside for SDVOSBs. Kingdomware also protested restrictive specifications that called for a competitors's feature.

The DVA responded with a request to dismiss the protest on the basis that DVA was undertaking corrective action that made the protest moot. DVA stated:

> VA has determined that its statement of work may not have been in accordance with the Federal Acquisition Regulation and prior GAO case law. VA will undertake corrective action in the instant protest by creating a requirement that is broadly defined and re-soliciting it. The new solicitation or request for quote will include a

> revised statement of work, and other changes deemed appropriate. In addition, VA will undertake extensive market research to determine the viability of a small business set-aside, with special consideration to a potential Service Disabled Veteran Owned Small Business set-aside.

Based on DVA's promise to take corrective action, GAO dismissed the protest

c) GAO No. 405596.3 Kingdomware filed a second protest on the same work requirement solicited in No. 405596 on October 13, 2011. Instead of taking the corrective action the DVA said it would take in GAO No. 405596, the DVA sought to fulfill its requirements under FAR 8.4, Federal Supply Schedule. Kingdomware also protested that the requirement should be set-aside for SDVOSB participation.

This protest was dismissed by GAO based on a new promise by the DVA to grant corrective action that would satisfy Kingdomware's request in the second protest on this requirement. The GAO decision dated November 28, 2011 stated:

> Subsequent to the filing of this protest, the agency notified our Office of its intent to directly request a quote from Kingdomware using Federal Acquisition Regulation (FAR) part 8.4 procedures, which granted the relief requested and rendered the protest academic. Specifically, the agency will request a new quote to include a revised statement of work and other changes deemed appropriate.

Kingdomware filed a third protest concerning this requirement on December 15, 2011 alleging that DVA

did not request a quote from Kingdomware using the FAR Part 8.4 procedures as it promised in getting the earlier protest dismissed.

d) GAO No. 405797.1—Kingdomware filed a protest with GAO on September 23, 2011 concerning solicitation Ebuy RFQ624196 FY 12 Live Process Subscription. Kingdomware protested that the solicitation was being conducted as a sole source award even though Kingdomware provides the same services as Live Process. Kingdomware also protested that DVA did not perform proper market research to see if the acquisition should be set-aside for SDVOSBs. On October 21, 2011 the solicitation was cancelled. Kingdomware sent an e-mail to the contracting officer and DVA attorney stating:

> Kingdomware Technologies and SDV Security LLC are two independent Service Disabled Veteran Owned Businesses (SDVOSBs) certified by the Department of Veteran's Affairs (VA). We both provide mass notification, incident management and document storage systems and services. Both of our companies are very interested in the DVA opportunity that was listed as a Live Process Subscription. Live Process is a competitor to each of our companies.

Because DVA stated that the solicitation would be cancelled the protest was dismissed.

(e) GAO 406633.2—Is a sequel to GAO 405797.1. It was filed on April 16, 2012. Both Kingdomware and a competitor, SDV Security, which is also a verified SDVOSB, filed protests with GAO over the earlier solicitation in 405797.1 and 495797,2. Therefore, the DVA was aware that there were two SDVOSBs

that were interested in the requirement when the solicitation was issued. Kingdomware alleged that DVA violated the Veterans First Contracting Program, 38 U.S.C. §§ 8127 and 8128, because it did not set the requirement aside for competition limited to SDVOSBs. The protest also alleged that the DVA used a statement of work prepared by a competitor, Live Process.

(f) GAO 406010—Kingdomware filed a protest with GAO on October 14, 2011 concerning an award made on October 5, 2011. The award was made as an Agency Task Order against a GSA Schedule contract for Emergency Notification Services to be provided to Overton Brooks DVA Medical Center. The protest alleged that the DVA had failed to conduct market research to determine if there were two or more SDVOSBs who could be expected to submit a bid or offer for the work at a reasonable price in violation of 38 U.S.C. §8127 and 8128. Further, if the market research disclosed there were two or more SDVOSBs, then the DVA violated the mandatory SDVOSB set-aside required by 38 U.S.C. §8127(d).

The protest was dismissed because Kingdomware did not establish that the protest was timely filed with GAO.

(g) GAO 406228— included in this Complaint as Claim for Relief Two,

(h) GAO 406507 included in this Complaint as Claim for Relief Three.

24. By continuing to award contracts using the priorities in FAR Part 8 rather than the preferences in the Veterans First Contracting Program Defendants United States, DVA, and Eric K. Shinseki are in viola-

tion of the Veterans First Contracting Program, 38 U.S.C. §8127(d) and §8128.

25. By refusing to conduct reasonable market research before proceeding with an acquisition of supplies or services to determine if there is a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States, Defendants are in violation of 38 U.S.C. §§8127 and 8128 and FAR Part 10, 48 C.F.R §10.000 *et seq.*

* * *

PARTIES' JOINT STIPULATION OF FACTS, SEPT. 4, 2012

Pursuant to the Court's scheduling order of August 21, 2012, the parties respectfully submit the "Parties' Joint Stipulation of Facts" relating to one of the three procurements identified in plaintiff's amended complaint.[1] The stipulated facts below relate to Department of Veterans Affairs (VA) award of contract No. VA-245-12-F-0622, which is included in plaintiff's amended complaint as the third claim for relief. Am. Compl. at 14-16. Plaintiff also protested this award to the Government Accountability Office (GAO), and GAO issued Comptroller General Decision B-406507, dated May 30, 2012.

FACTS

1. In approximately January 2012, the VA determined that it needed to procure an Emergency Notification Service (ENS) for the Veterans Integrated Service Network 5, a grouping of four VA medical centers and associated outpatient clinics.

2. The purpose of an ENS is to rapidly deliver messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster. The proposed contract was intended to provide ENS services only until a VA-wide notification system is implemented, which is anticipated to occur during fiscal year 2012.

3. The contracting officer decided to satisfy the VA's requirements under Federal Acquisition Regulation (FAR) subpart 8.4 using the General Services Administration Federal Supply Schedule (FSS).

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[1] "Amended Complaint" refers to plaintiff's amended complaint filed July 18, 2012.

4. The VA contract officer conducted market research and identified three possible sources for the ENS. However, the contracting officer determined that none of the three possible sources could meet the VA's requirements. Thus, a limited source FSS justification was conducted in accordance with FAR 8.405-6.

5. On or about February 14, 2012, the contracting officer sent Request for Quote (RFQ) VA245-12-Q-0078 to FSS vendor, Everbridge Inc. (Everbridge), to solicit a quote for ENS services.

6. Everbridge submitted a quote of $33,824.10 for the base year of March 1, 2012 through February 28, 2013; $33,824.10 for option year 1, if exercised, and $33,824.10 for option year 2, if exercised.

7. On or about February 22, 2012, after the having determined that Everbridge offered a fair and reasonable price, the contracting officer awarded a task order contract to Everbridge pursuant to its FSS BPA (VA245-BP-0139) for the base year at $33,824.10, and a total amount of $101,472.30 if both option years were exercised.

8. The contracting officer then posted the contract award to the Federal Procurement Data System-Next Generation reporting system, which included basic information on this contracting action including the contracting activity, the awardee, the contract term, and dollar amount of the award.

9. On March 14, 2012, plaintiff Kingdomware Technologies, Inc. (Kingdomware) filed a bid protest with the GAO objecting to the award on the basis that the VA allegedly had not complied with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 Act).

10. After briefing from both parties, on May 30, 2012, the GAO issued a decision sustaining the protest.

11. On or about August 8, 2012, VA responded to the GAO and Kingdomware that VA would decline to follow the GAO recommendations in GAO's decision in B-406507.

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Patricia M. McCarthy
PATRICIA M. MCCARTHY
Assistant Director

s/ Robert C. Bigler
ROBERT C. BIGLER
Trial Attorney
Commercial Litigation Branch
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P.O. Box 480
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Attorneys for Defendant

s/ Timothy H. Power
TIMOTHY H. POWER
327 First Street West
Apt. 1
Sonoma, CA 95476
Telephone: (707)938-7183
Attorney for Plaintiff

September 4, 2012

LETTER FROM ANDREA M. GARDNER-INCE TO TIMOTHY BARTON

SEP 0 5 2012

Mr. Timothy Barton
Kingdomware Technologies, Inc.
DUNS # 848528105
11186 Bel Aire Court
Waldorf, MD 20603

In Reply Refer To: OOVE

Dear Mr. Barton:

On behalf of the U.S. Department of Veterans Affairs (VA), Center for Veterans Enterprise (CVE), I am writing to inform you that your service-disabled Veteran-owned small business (SDVOSB) has been verified and added to the Veteran business database at www.vip.vetbiz.gov.

Kingdomware Technologies, Inc., will be eligible to participate in Veterans First Contracting Program opportunities with VA. This verification is valid for up to two years from the date of this letter.

To promote your verified status, you may use the following logo link to download the logo for use on your marketing materials and business cards:

http://www.vetbiz.gov/cve_completed_s.jpg

To ensure that your business is correctly listed in the Vendor Information Pages, check your profile for the verified logo. Please notify us if the logo is not present within 72 hours of receipt of this letter.

Thank you for your service to our country and for continuing to serve America through small business ownership.

Respectfully,

/s/

Andrea M. Gardner-Ince
Center for Veterans Enterprise

**PARTIES' JOINT STATUS REPORT,
DEC. 10, 2012**

Pursuant to the Court's opinion and order, dated November 27, 2012, the parties respectfully submit this status report as to the next steps in this litigation and whether the parties would like the Court to direct entry of judgment in this matter. The parties have discussed the Court's opinion and both parties agree and hereby respectfully request that the Court enter judgment for the Government as to all three of the procurements identified in plaintiff's amended complaint for the reasons stated in the Court's opinion, dated November 27, 2012.

Respectfully Submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Timothy H. Power
TIMOTHY H. POWER
327 First Street West
Apt. 1
Sonoma, CA 95476
Telephone: (707)938-7183
Attorney for Plaintiff

s/ Patricia M. McCarthy
PATRICIA M. MCCARTHY
Assistant Director

s/ Robert C. Bigler
ROBERT C. BIGLER
Trial Attorney
Commercial Litigation Branch

Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-0315

December 10, 2012

Attorneys for Defendant

ORDER FOR ENTRY OF JUDGMENT, DEC. 12, 2012

Based on the parties' joint status report, filed December 10, 2012, in which the parties request that the court, for the reasons identified in the November 27, 2012 opinion (ECF No. 30), enter judgment for defendant as to all three of the procurements identified in plaintiff's amended complaint. Accordingly, the Clerk of the Court is directed to enter judgment for defendant under Rule 54(b) of the Rules of the United States Court of Claim. Each party shall bear its own costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

GOVERNMENT ACCOUNTABILITY OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, DECISION

Matter of: Kingdomware Technologies

File: B-406507

Date: December 13, 2012

* * *

DECISION

Kingdomware Technologies, of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB), requests reconsideration of our decision in Kingdomware Technologies, B-407232, Sept. 17, 2012, in which we dismissed a protest challenging the award of task order No. VA255P657SC1615, and the exercise of an option under that task order, by the Department of Veterans Affairs (VA) to LiveProcess, Inc., of Madison, New Jersey, under that firm's Federal Supply Schedule (FSS) contract.

We dismiss the request because, as discussed below, our Office will no longer consider protests concerning the contention that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. §§ 8127-28 (2006), requires the VA to consider setting aside a procurement for SDVOSBs, or veteran-owned small businesses (VOSB), before procuring its requirements under the FSS.

On August 1, 2011, the VA issued the task order on a sole-source basis under LiveProcess' FSS contract. The VA posted information concerning the task order on the Federal Procurement Data System (FPDS)

website the same day.[1] One year later, on August 1, 2012, the VA exercised an option to extend the task order, and posted the information on FPDS on August 2. The VA did not post the task order award or exercise of the option on the Federal Business Opportunities (FedBizOpps) website. On August 18, Kingdomware became aware of the information on FPDS, and on August 27 protested to our Office both the 2011 award, and the 2012 exercise of the option.

Kingdomware argued that the VA's award of the initial task order, and its exercise of the task order option one year later, did not comply with the requirements of the 2006 VA Act. Kingdomware cited our Office's decision in Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, where we held that the plain meaning of 38 U.S.C. § 8127(d) requires the VA to conduct market research concerning its requirements and determine whether there are two or more SDVOSBs (or VOSBs) capable of performing the requirements, and if so, to set the requirement aside exclusively for SDVOSB (or VOSB) concerns. Specifically, our Office held in Aldevra that the VA must consider whether to set aside the procurement for SDVOSBs (or VOSBs) prior to conducting a procurement on an unrestricted basis under the FSS.

On September 17, our Office dismissed Kingdomware's protest. We dismissed the challenge to the underlying task order award and failure to post the award on the FedBizOpps website, concluding that, given passage of more than one year since the award of the order, "no

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[1] FPDS is a publicly available database of information about executive agency contract actions above the micro-purchase threshold, located at https://www.fpds.gov. Federal Acquisition Regulation §§ 4.602, 4.603.

useful purpose is served by our considering a protest of the action." Kingdomware Techs., supra, at 2. We also dismissed the challenge to the exercise of the option on the task order because our Office will generally not question an agency's exercise of an option contained in an existing contract, unless the protester shows that the agency failed to follow applicable regulations, or the agency's determination to exercise the option, rather than conduct a new procurement, was unreasonable. Id. at 2-3.

Kingdomware requests reconsideration of our decision. This request is based, at its core, on a contention that the 2006 VA Act requires the VA to consider a set-aside for SDVOSBs (or VOSBs) prior to conducting an unrestricted procurement under the FSS. Recent actions by the VA and the U.S. Court of Federal Claims lead our Office to conclude that we should not continue hearing protests that rely solely on this contention.

In response to our Office's decision in Aldevra and other decisions regarding the 2006 VA Act,[2] the VA has advised that it will not follow our recommendations concerning our interpretation of the 2006 VA Act. See GAO Annual Report to Congress for Fiscal Year 2012, at 1, available at: http://www.gao.gov/products/GAO-13-162SP. Additionally, on November 27, the U.S. Court of Federal Claims issued a decision which disagreed with our Office's interpretation of the 2006 VA Act. Kingdomware Techs., Inc. v. United States, No. 12-173C (Fed. Cl., Nov. 27, 2012). The court held that the VA's interpretation of the 2006 VA Act and its reg-

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[2] E.g., Kingdomware Techs., B-405727, Dec. 19, 2011, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119.

ulations, which permit the VA to place orders on the FSS without first considering whether to set aside a requirement for SDVOSB (or VOSB) firms, was entitled to deference. Id. at 34, 35.

While this Office has set forth its view of the 2006 VA Act in Aldevra and its progeny, as well as in testimony before the Congress,[3] the VA has elected not to follow our recommendations. In addition, the court has reached a different conclusion about the meaning of the 2006 VA Act. Although our Office is not bound by the court's decisions, its decision in Kingdomware, together with the VA's position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief. Consequently, under these circumstances, we will no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS.

The request for reconsideration is dismissed.

Susan A. Poling
General Counsel

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[3] Veterans Administration Procurement: Protests Concerning Service-Disabled Veteran-Owned Small Business Preferences Sustained, GAO-12-278T (Nov. 2011).

LETTER FROM ROBERT C. BIGLER TO FEDERAL CIRCUIT

March 18, 2014

BY ECF

The Honorable Daniel E. O'Toole
Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Kingdomware v. United States*, 2013-5042

Dear Mr. O'Toole:

As requested by the Court during oral argument, enclosed is an appendix which includes the veteran-owned small business contracting goals set by the Department of Veterans Affairs (VA) for fiscal years 2006 through 2013. We have also enclosed, as requested by the Court, the percentages achieved by VA for awards to veteran-owned small businesses for FY2006 through FY2012. The results for FY2013 have not yet been finalized.

The Veterans Benefits, Health, Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-28 (the 2006 Act) became effective 180 days after its enactment on December 22, 2006. Pub. L. 109-461, Title V, § 502(d). Thus, the 2006 Act became effective towards the end of FY 2007 in June 2007. As a result, the 2006 Act was not fully implemented until FY2008.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

ROBERT E. KIRSCH-
MAN, JR.
Director

/s/ Patricia M. McCarthy
PATRICIA M.
MCCARTHYAssistant
Director

/s/ Robert C. Bigler
ROBERT C. BIGLER
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Enclosure

APPENDIX*

* Table of contents from original document omitted.

May 11, 2006

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD FACILITY DIRECTORS

SUBJECT: Department-wide Small Business Program Goals for FY 2006 and FY 2007

President George W. Bush and I recognize and respect the value of small business to our Government and way of life. The President has set forth an aggressive small business agenda that contains many important initiatives to assist and sustain small business in its contributions to a robust American economy. Under this. Administration, the Department of Veterans Affairs (VA) is committed to supporting the growth and prosperity of small business. Make no mistake about it, small business is the great engine that drives America's economy. As the saying goes, "*The business of the American People is business.*"

Small business represents 99 percent of all employers, employing more than half of the Nation's private sector workforce. Small business creates three of every four new jobs and generates the majority of American inventions and innovations. It also accounts for more than 50 percent of the Nation's Gross Domestic Product. Entrepreneurship has become the path to prosperity for many Americans, including service-disabled veterans, veterans, women, and minorities.

I am keenly aware of the accomplishments and importance of small businesses to VA in providing optimum service to America's veterans. Small business sustains VA's business-serving America's veterans and their families. Small business is our partner in provid-

ing the services and supplies that underwrite our network of care. Small business helps us fulfill our mission *"to care for him who shall have borne the battle, and his widow and his orphan."* When VA partners with small business, we serve not only veterans, but the community-at-large, and in a greater sense, the country-at-large. We become an agent for economic growth by contributing to local communities and position ourselves to create a more wide-reaching and effective VA.

Maximizing opportunities for veteran-owned and service-disabled veteran-owned small businesses is a priority and must continue in FYs 2006 and 2007. Doing business with these firms is a logical extension of VA's mission: spending our acquisition dollars with the very individuals we are charged with serving.

As the chief advocate for veterans at the Federal level, veteran-owned and service-disabled veteran-owned small businesses look to VA to be the leader in these two important socioeconomic categories. Deputy Secretary Mansfield and I are committed to VA becoming the Federal leader in these categories.

Goals for this and next fiscal year are based on total procurement dollars spent and are shown below. I believe these goals are more realistic than the "stretch goals" proposed in recent years. They take into consideration the realities and competing interests faced by VA acquisition professionals, program managers and officials in carrying out our mission. By setting more realistic goals, we establish goals that are both meaningful and attainable, yet challenging as we work to serve our Nation's veterans:

Small Business	25%

In addition, specific goals based upon total procurement dollars have been established for the following categories of small businesses:

Small Disadvantaged Business (includes Section 8(a))	9%
Women-Owned Small Business	5%
Service-Disabled Veteran-Owned Small Business	3%
Historically Underutilized Business (HUB) Zone Small Business	3.05%
Veteran-Owned Small Business	7%

Every Secretary of Veterans Affairs has recognized the socioeconomic accomplishments of its contracting activities for surpassing the Secretary's goals. I am proud to continue the Secretary's Socioeconomic Achievement Awards Program and challenge every VA contracting activity to commit to becoming an award recipient for their FY 2006 and 2007 accomplishments.

/s/
R. James Nicholson

January 28, 2008

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD FACILITY DIRECTORS

SUBJECT: Department-wide Small Business Program Goals for Fiscal Year (FY) 2008 and FY 2009

Below are the FY 2008 and FY 2009 Small Business Program Goals. Goals for this and next fiscal year are based on total procurement dollars spent and are shown below. These goals are realistic, attainable and take into consideration the realities and competing interests faced by VA acquisition professionals, program managers, and officials in carrying out our mission.

Department-wide Small Business Program Goals for FY 2008 and FY 2009

Small Business	28.7%

In addition, specific goals based upon total procurement dollars have been established for the following subcategories of small business:

Service-Disabled Veteran-Owned Small Business	7%
Veteran-Owned Small Business	10%
Small Disadvantaged Business (includes Section 8(a))	5%
Historically Underutilized Business (HUB) Zone Small Business	3%
Women-Owned Small Business	5%

The service-disabled veteran-owned small business and the veteran-owned small business goal are established pursuant to Section 8127(a) of 38 U.S.C., and are

applicable to Department of Veterans Affairs (VA) prime contract awards and subcontracts awarded by large business VA prime contractors.

The Department has a long history of supporting small business programs in serving our Nation's veterans. I am proud to lend my support to ensuring maximum practicable opportunities exist in VA acquisitions for small businesses, especially those owned by veterans. Not only is contracting with veteran-owned small businesses a natural extension of the Department's mission, it is good business to spend VA's acquisition dollars to create economic opportunities within the very community we are charged with serving.

In FY 2007, VA exceeded both the service-disabled veteran-owned and veteran-owned small business goals, making VA the clear leader in the Federal community in contracting with veteran entrepreneurs. Although we can all be proud of these important accomplishments, we must continue our efforts to improve upon them. Our FY 2008 and FY 2009 goals strengthen VA's commitment to veteran entrepreneurs and will further challenge and motivate VA's dedicated workforce. Deputy Secretary Gordon H. Mansfield and I are personally committed to ensuring VA remains the Federal leader in contracting with veteran entrepreneurs.

Thank you for your continued support of small businesses and veteran entrepreneurs.

/s/
James B. Peake, M.D.

May 7, 2010

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD DIRECTORS

SUBJECT: Fiscal Year (FY) 2010 and FY 2011 Department-wide Small Business Program Goals

The Department of Veterans Affairs (VA) has a long history of supporting small business programs. I am proud to lend my support to ensuring that maximum practicable opportunities exist in VA acquisitions for small businesses, especially those owned by Veterans. Contracting with Veteran-owned small business is a natural extension of the Department's mission. It is good business to spend VA's acquisition dollars to create economic opportunities within the very community we are charged with serving. I am proud that VA was the leader among all Federal agencies in prime contract awards to Service Disabled Veteran Owned and Veteran Owned Small Businesses in FY 2009. VA needs to also be the leader in subcontracting accomplishments.

During my speech at the 5th Annual National Veterans Small Business Conference, I recognized that VA has not done well in regard to subcontracting achievements and stated that this is going to change. I believe our FY 2010 and FY 2011 prime and subcontracting goals reflect VA's strong commitment to small business and Veteran entrepreneurs. While these goals are challenging, they are also realistic, attainable, and take into consideration the realities and competing interests faced by VA acquisition professionals and program officials in carrying out our mission, which includes compliance with all applicable laws and regulations related to contract awards.

Goals for FY 2010 and FY 2011 are based upon total procurement dollars expended. The prime contracting goals are as follows:

Small Business	33.5%
Veteran Owned Small Business	12.0%
Service Disabled Veteran Owned Small Business	10.0%
Small Disadvantaged Businesses (includes Section 8(a))	5.0%
Woman-Owned Small Business	5.0%
Historically Underutilized Business (HUB) Zone Small Business	3.0%

Subcontracting goals for FY 2010 and FY 2011 are as follows:

Small Business	17.7%
Veteran Owned Small Business	5.0%
Service Disabled Veteran Owned Small Business	3.0%
Small Disadvantaged Businesses (includes Section 8(a))	5.0%
Woman-Owned Small Business	5.0%
Historically Underutilized Business (HUB) Zone Small Business	3.0%

During the coming years, I will recognize outstanding performance by contracting facilities across VA by continuing the Secretary's Socioeconomic Achievement Awards Program. Thank you for your continued support of small business and Veteran entrepreneurs.

/s/
Eric K. Shinseki

February 21, 2012

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, HEADS OF CONTRACTING ACTIVITY, AND FIELD DIRECTORS

SUBJECT: Fiscal Year (FY) 2010 and FY 2011 Department-wide Small Business Program Goals

The Department of Veterans Affairs (VA) continues to lead the Federal government in contracting with small businesses, especially service-disabled and other Veteran-owned small businesses. With the fourth largest procurement budget, amounting to over $16 billion in FY 2010, VA out-paced every other civilian agency in contract dollars awarded to small businesses. I am grateful to you and to VA's acquisition professionals and program managers for recognizing the value small business brings in supplying our contracting requirements, and for once again earning an "A" on the Small Business Administration's 2010 Small Business Procurement Scorecard.

We must continue to build on that success, and do so in a challenging budget environment. Small businesses employ about half of America's workforce, and created 65% percent of net new jobs between 1993 and 2009. Small businesses are a vital part of our nation's economic recovery. Small business entrepreneurship provides a key option for Veterans seeking to reintegrate into our nation's domestic life after honorable military service. When VA spends its contracting dollars with small businesses, we not only purchase the goods and services we need to serve Veterans directly, we leverage that spending to support Veterans in America's competitive marketplace.

Accordingly, I am establishing VA's Department-wide small business goals for FY 2012 and FY 2013, as set forth below. These goals are based upon VA's total procurement dollars expended. I am also directing the Acting Chief Acquisition Officer (CAO) and the Executive Director, Small and Veteran Business Programs, in collaboration with the Heads of Contracting Activity (HCA), to lead a task force to develop comparable goals for the Administrations and Staff Offices with procurement authority.

Further, the task force will develop systems for monitoring and managing progress toward these goals. I expect the Acting CAO and the Executive Director to closely monitor VA's performance in this area, and I expect the HCAs to aggressively manage performance in contracting activities under their purview. I look forward to receiving the task force's recommendations. However, the need to focus our procurement efforts on meeting the FY 2012 goals begins immediately. The Executive Director will provide me with a detailed quarterly report, in addition to summary reports provided as part of the Monthly Performance Review process.

Prime Contracting Goals

Small Business	34.0%
Veteran-Owned Small Business	12.0%
Service-Disabled Veteran-Owned Small Business	10.0%
Small Disadvantaged Businesses (including Section 8(a))	5.0%
Women-Owned Small Business	5.0%
Historically Underutilized Business Zone (HUBZone) Small Business	3.0%

Subcontracting Goals

Small Business	17.5%
Veteran-Owned Small Business	5.0%
Service-Disabled Veteran-Owned Small Business	3.0%
Small Disadvantaged Businesses (including Section 8(a))	5.0%
Women-Owned Small Business	5.0%
Historically Underutilized Business Zone (HUBZone) Small Business	3.0%

These are ambitious goals for VA. They are achievable only with our concerted efforts to provide opportunities for small businesses and add value to the mission of VA. I will continue to recognize outstanding small business achievements through the Secretary's Socioeconomic Achievement Awards Program. Thank you for your continued support of small businesses, Veteran entrepreneurs, and Veterans.

/s/
Eric K. Shinseki

Department of Veterans Affairs Small Business Goaling Numbers
Fiscal Year 2006 Through Fiscal Year 2012

Funding Department	Total Small Business Eligible Actions	Total Small Business Eligible Dollars	Small Business Percentage	Veteran Owned Small Business Actions	Veteran Owned Small Business Dollars	Veteran Owned Small Business Percentage	Service Disabled Veteran Owned Small Business Actions	Service Disabled Veteran Owned Small Business Dollars	Service Disabled Veteran Owned Small Business Percentage
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2006	2,887,894	$9,972,594,538.87	28.7077%	290,127	$616,294,696.49	6.1799%	41,970	$356,206,175.56	3.5719%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2007	3,943,523	$11,735,408,740.83	32.8466%	399,541	$1,216,580,370.73	10.3667%	51,304	$831,811,813.84	7.0881%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2008	2,939,134	$14,100,026,740.41	35.1568%	396,340	$2,099,307,288.37	14.8887%	161,372	$1,661,424,970.69	11.7831%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2009	230,253	$14,545,213,660.26	34.9418%	29,412	$2,905,861,620.63	19.9781%	18,924	$2,466,320,013.65	16.9562%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2010a	473,523	$16,039,864,961.02	37.3469%	34,694	$3,701,396,706.47	23.0762%	24,490	$3,215,644,534.22	20.0478%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2011	1,351,641	$17,564,879,551.80	33.6639%	36,641	$3,601,045,194.22	20.5014%	24,623	$3,200,437,617.67	18.2207%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2012	1,901,975	$17,520,631,014.19	35.0093%	107,091	$3,813,442,163.54	21.7654%	23,097	$3,371,804,926.75	19.2448%

LETTER FROM LAUREN B. FLETCHER TO FEDERAL CIRCUIT

April 2, 2014

BY ECF

The Honorable Daniel E. O'Toole
Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Kingdomware v. United States*, 2013-5042

Dear Mr. O'Toole:

On March 18, 2014, Appellee submitted an appendix regarding the Department of Veterans Affairs' ("VA") annual goals for contracting with veteran-owned small businesses, as well as the percentages VA has achieved for awards made to veteran-owned small business for FY2006-FY2012.

Appellee's submission does not identify the source of the data, nor does it explain the criteria for each of the categories identified in the chart providing percentages VA has achieved for awards made to veteran-owned small businesses. Indeed, the chart appears to have been created specifically in response to the Court's request in this litigation. Moreover, no evidence in the record indicates that VA contracting officers are relying on this type of data in making their contracting decisions. *See* A170-A172, Stipulated Facts (making no reference to assessing whether the acquisition should be used to meet the goals; instead stating at A171, "The contracting officer decided to satisfy the VA's requirements under Federal Acquisition Regulation (FAR) subpart 8.4 using the General Services Administration

Federal Supply Schedule (FSS)."); A67, 10/17/2011 E-mail from Deputy Assistant Secretary for Acquisition and Logistics to All VA Acquisition and Procurement Officials/Personnel (instructing VA contracting officers to continue ordering from the FSS, without instructing that VA's progress toward its contracting goals should be considered); 48 C.F.R. § 819.7005 (VA regulation mandating that contracting officers shall set aside procurements for SDVOSBs when the Rule of Two is met and making no reference to goals); 48 C.F.R. § 819.7006 (same for VOSB).

Respectfully submitted,

/s/ Lauren B. Fletcher

Lauren B. Fletcher

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IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The Federal Circuit, however, relied on a prefatory clause in the statute to limit the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kingdomware Technologies, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

STATUTES AND REGULATIONS INVOLVED 5

STATEMENT 7

A. Procurement Background 8

1. The Small Business Act and FAR part 19 8

2. FAR part 19 and federal supply schedules 9

B. Amendments To The Small Business Act For Service-Disabled Veterans 11

1. The 1999 Veterans Act 11

2. The 2003 Veterans Act 12

C. The 2006 Veterans Act 13

1. Statutory text and purpose 13

2. Implementing regulations 16

3. Subsequent amendments 18

D. *Aldevra* Bid Protests 18

E. Prior Proceedings 21

SUMMARY OF ARGUMENT 25

TABLE OF CONTENTS—Continued

Page

ARGUMENT 28

I. THE TEXT, PURPOSE, AND HISTORY OF THE 2006 VETERANS ACT CONFIRM THAT THE RULE OF TWO IS MANDATORY, NOT DISCRETIONARY 28

A. The Plain Language Of § 8127(d) Is Mandatory 28

B. The "For Purposes Of" Clause Does Not Limit The Rule Of Two Mandate 30

1. The "for purposes of" clause is a prefatory statement of purpose 31

2. The statute mandates both goal-setting and application of the Rule of Two 36

3. Contrary readings of the "for purposes of" clause are unworkable or indefensible 38

C. The Legislative History And Purpose Of The Act Show That Congress Intended To Require The VA To Use The Rule Of Two 41

D. The Veterans Canon Also Weighs In Favor Of Reading § 8127(d) As Mandatory 43

II. THE VA'S REGULATIONS FURTHER CONFIRM THAT THE RULE OF TWO IS MANDATORY AND UNDERCUT ANY ARGUMENT FOR DEFERENCE TO THE VA'S LITIGATING POSITION 44

TABLE OF CONTENTS—Continued

Page

A. There Is No Need To Proceed Beyond The First Step Of *Chevron* 44

B. The Language Of The VA's Own Regulations Is Mandatory 46

C. The VA's Attempt To Create An Exception For FSS Orders Is Not Entitled To Deference 48

III. CONGRESS REQUIRED THE VA TO APPLY THE RULE OF TWO FOR SENSIBLE REASONS THAT AN EXECUTIVE AGENCY MAY NOT SECOND-GUESS 53

A. Congress Determined That The Rule Of Two Is Necessary And Desirable 53

B. The VA's Difficulties Accurately Reporting Its Small-Business Contract Awards Confirm The Wisdom Of Congress's Choice 56

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 29

Anderson v. *Yungkau*, 329 U.S. 482 (1947) 29

Association of American Railroads v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977) 32

Auer v. *Robbins*, 519 U.S. 452 (1997) 51

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 28, 55

Boone v. *Lightner*, 319 U.S. 561 (1943) 1, 43

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 50

Brown v. *Gardner*, 513 U.S. 115 (1994) 43

Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 22, 27, 45, 47

Christensen v. *Harris County*, 529 U.S. 576 (2000) 51

City of Arlington v. *FCC*, 133 S. Ct. 1863 (2013) 45

CMS Contract Management Services v. *Massachusetts Housing Finance Agency*, 745 F.3d 1379 (Fed. Cir. 2014) 21

Cobell v. *Norton*, 240 F.3d 1081 (D.C. Cir. 2001) 45

Davis v. *Michigan Department of Treasury*, 489 U.S. 803 (1989) 38

Decker v. *Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013) 50, 51

TABLE OF AUTHORITIES—Continued

Page(s)

District of Columbia v. *Heller*, 554 U.S. 570 (2008) 32, 33, 34

Engine Manufacturers Ass'n v. *EPA*, 88 F.3d 1075 (D.C. Cir. 1996) 52

FCC v. *AT&T Inc.*, 562 U.S. 397 (2011) 39

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) 43

Florentine v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239 (2d Cir. 1965) 32

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 51

Gutierrez de Martinez v. *Lamagno*, 515 U.S. 417 (1995) 29

Hawaii v. *Office of Hawaiian Affairs*, 556 U.S. 163 (2009) 34

Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428 (2011) 43

INS v. *St. Cyr*, 533 U.S. 289 (2001) 45

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 44

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) 29

Matter of Aldevra, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 19, 20, 50

Matter of Aldevra, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) 20, 35, 50

TABLE OF AUTHORITIES—Continued

Page(s)

Metropolitan Stevedore Co. v. *Rambo*, 515 U.S. 291 (1995) 43

National Wildlife Federation v. *Marsh*, 721 F.2d 767 (11th Cir. 1983) 32

NLRB v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987) 45

Oncale v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) 34

Parish Oil Co. v. *Dillon Cos.*, 523 F.3d 1244 (10th Cir. 2008) 33

SEC v. *Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013) 33

Sharp Electronics Corp. v. *McHugh*, 707 F.3d 1367 (Fed. Cir. 2013) 10

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 49

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 52

TVA v. *Hill*, 437 U.S. 153 (1978) 53

United States ex rel. Siegel v. *Thoman*, 156 U.S. 353 (1895) 29

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 50

United States v. *Monsanto*, 491 U.S. 600 (1989) 29

United States v. *Rodgers*, 461 U.S. 677 (1983) 29, 30

Wos v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013) 50

TABLE OF AUTHORITIES—Continued

Page(s)

Wyeth v. *Levine*, 555 U.S. 555 (2009) 50

Wyoming Outdoor Council v. *United States Forest Service*, 165 F.3d 43 (D.C. Cir. 1999) 51

Yazoo & Mississippi Valley Railroad v. *Thomas*, 132 U.S. 174 (1889) 32

STATUTES

15 U.S.C.

§§ 631-657s 8
§ 631(a) 8
§ 637(a)(1)(A) 10
§ 637(m)(2) 9, 10
§ 644 note (2006) 35
§ 644(a)(3) 9
§ 644(g) 2, 7, 11, 30
§ 644(g)(1)(A) 8
§ 644(g)(1)(A)(ii) 11, 32
§ 644(g)(1)(B) 9
§ 657a(b)(2)(B) 10
§ 657f 7
§ 657f(a) 2, 12
§ 657f(b) 12, 30

28 U.S.C.

§ 1254(1) 4
§ 1491(b)(1) 22

31 U.S.C. § 3554(b) 21

TABLE OF AUTHORITIES—Continued

Page(s)

38 U.S.C.
§ 8127 ..... 7, 13
§ 8127(a) ..... *passim*
§ 8127(a)(1) 26
§ 8127(a)(3) 14, 32
§ 8127(b) ..... *passim*
§ 8127(c) ..... *passim*
§ 8127(d) ..... *passim*
§ 8127(e) 15, 36, 55
§ 8127(f) 15, 36, 55
§ 8127(g) 15, 36
§ 8127(j) 18, 58
§ 8128 ..... 7, 13
§ 8128(a) 16

41 U.S.C. § 134 15

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TABLE OF AUTHORITIES—Continued

Page(s)

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REGULATIONS

48 C.F.R.
ch. 8 9
§ 1.103(b) 52
§ 2.101 37
§ 8.402(a) 10
§ 8.404(a) 9, 20, 49
§ 8.405-5(a) 9
§ 8.405-5(a)(1) 49
§ 19.502-1(b) 9, 49
§ 19.502-2(b) 9
§ 19.1505(c) 9
§ 33.101 19
§ 33.103 19
§ 33.104 19
§ 33.105 19
§ 810.001 ..... 16, 56
§ 813.106 ..... 17, 47
§ 819.7005(a) 16, 35, 46, 47
§ 819.7006(a) 16, 35, 46, 47
§ 819.7007 47
§ 819.7007(a) 17

TABLE OF AUTHORITIES—Continued

Page(s)

§ 819.7007(b) 17
§ 819.7008 47
§ 819.7008(a) 17
§ 819.7008(b) 17
subpt. 819.70 ..... 7, 16, 46

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LEGISLATIVE AND EXECUTIVE MATERIALS

152 Cong. Rec. 23,509 (2006) 42, 43

H.R. Rep. No. 106-206 (1999) 11

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TABLE OF AUTHORITIES—Continued

Page(s)

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Page(s)

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IN THE

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No. 14-916

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

INTRODUCTION

The United States has long recognized a special obligation to protect and reward those who "drop their own affairs to take up the burdens of the nation" in military service. *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). This case involves a series of legislative actions, many taken during the nation's most recent armed conflicts, to honor the extraordinary service of veterans by ensuring that they have a fair opportunity to participate in contracting with the federal government. The Federal Circuit's decision in this case gutted the most important of those provisions and should be reversed.

The statute at issue, the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 ("2006 Veterans Act"), was the culmination of years of efforts to encourage federal agencies to increase contracting opportunities for veterans. Congress began in 1999 by amending the Small Business Act to require the government to set annual goals for awarding contracts to small businesses owned by veterans with service-related disabilities. 15 U.S.C. § 644(g). After nearly every agency—including the Department of Veterans Affairs ("VA")—failed to meet those goals, Congress again amended the Small Business Act in 2003 to permit, but not require, contracting officials to restrict competition for some contracts to small businesses owned by service-disabled veterans. *Id.* § 657f(a) (contracting officers "may award" contracts using limited competition).

When that too proved inadequate, Congress enacted the 2006 Veterans Act as stand-alone legislation, separate from the Small Business Act. The 2006 Veterans Act focuses solely on the VA and extends to all veteran-owned small businesses as well as service-disabled veteran-owned small businesses. The Act provides that the VA "*shall* award" contracts on the basis of competition restricted to service-disabled or other veteran-owned small businesses whenever a contracting officer reasonably expects that two or more such businesses will submit offers and that the award can be made at a "fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d) (emphasis added). The only exceptions to this VA-specific mandate to restrict competition to veteran-owned small businesses provide that a contracting officer "*may*" award certain small contracts directly to a

veteran-owned small business using non-competitive procedures. *Id.* § 8127(b), (c) (emphasis added).

A divided panel of the Federal Circuit, however, held that the "mandate" in § 8127(d) applies only when a VA contracting officer, in his or her discretion, determines that a particular contract should be used to help the VA meet its annual goals for contracting with veteran-owned small businesses. To reach this conclusion, the panel majority relied on § 8127(a), which requires the VA Secretary to set such annual goals, and a prefatory clause in § 8127(d), which states that contracting officers shall award contracts on the basis of restricted competition "'for purposes of meeting the [annual] goals.'" Pet. App. 20a. In the majority's view, "as long as the goals ... are met," the statute does not require any particular contracting procedures. *Id.* The majority viewed a mandatory mechanism for achieving the VA's annual goals as inconsistent with the Secretary's discretion to set the goals. *Id.*

That interpretation is deeply flawed. It fails to give effect to § 8127(d)'s plain language and disregards this Court's teaching that "shall" is the language of command, not discretion. It also improperly imbues the "for purposes of" clause in § 8127(d) with an operative force Congress never intended; properly construed, the clause explains the intended result of the mandate but does not limit or qualify it. The Federal Circuit's interpretation also rests on the false premise that agency-wide goals are incompatible with a mandatory mechanism for satisfying or surpassing the goals. There is no reason to think Congress wanted the goals to operate as a ceiling rather than a floor. Finally, the Federal Circuit's results-oriented view that the mandate is discretionary "as long as" the annual goals are met leaves the statute unworkable in practice, particularly in cir-

cumstances in which the agency fails to meet the goals it sets for itself.

If the Federal Circuit's interpretation of § 8127(d) is allowed to stand, the loss to America's veterans will be significant. Military service poses unique challenges for veterans reentering civilian life and operating small businesses. Congress has recognized those challenges and has sought to provide economic assistance, including procurement assistance, to ensure that the sacrifices made by the country's veterans are properly rewarded. To that end, § 8127(d) of the 2006 Veterans Act requires the VA—the agency uniquely responsible for serving America's veterans—to consider whether veteran-owned and service-disabled veteran-owned small businesses can supply the goods and services needed by the agency on reasonable terms, before turning to other suppliers. The agency should not be permitted to defy that statutory command.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (Pet. App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The Federal Circuit entered judgment on June 3, 2014, and denied Kingdomware's petition for rehearing en banc on September 10, 2014. Pet. App. 1a, 73a-74a. Kingdomware filed a timely petition for a writ of certiorari on January 29, 2015, and this Court granted the petition on June 22, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision at issue states:

> (d) USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d). The subsections that immediately precede this provision state:

> (a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—
>
> > (A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and
> >
> > (B) establish a goal for each fiscal year for participation in Department contracts

(including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

> (c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—
>
> (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
>
> (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and
>
> (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(a)-(c). The appendix to Kingdomware's petition for certiorari reproduces 15 U.S.C. §§ 644(g) and 657f, 38 U.S.C. §§ 8127-8128, and 48 C.F.R. subpart 819.70. Pet. App. 77a-95a.

STATEMENT

Congress often establishes alternative procurement procedures to accomplish policy goals that might be disserved by unrestricted competition. The statute at the center of this case, 38 U.S.C. § 8127(d), is one such example. It employs a form of restricted competition for government contracts, called the "Rule of Two," that is also used in other contexts to promote

contracting with small businesses. While the specifics vary, the idea behind a Rule of Two is that if there is a reasonable expectation that two or more small businesses of a particular type will submit bids at fair market prices for a contract, competition is limited to such businesses, which then compete among themselves to be awarded the contract. The Rule of Two in § 8127(d) applies only to the VA and favors small businesses owned by veterans and service-disabled veterans.

A. Procurement Background

Before turning to the specific statutory provision at issue, this section provides a brief overview of the framework governing federal procurement, including government-wide small business preferences that arise from the Small Business Act. 15 U.S.C. §§ 631-657s. Those preferences are not at issue here, but their shortcomings when extended to small businesses owned by service-disabled veterans provided the backdrop against which Congress enacted the VA-specific Rule of Two in § 8127(d).

1. The Small Business Act and FAR part 19

Congress enacted the Small Business Act after determining that the nation's economic "security and well-being cannot be realized unless the actual and potential capacity of small businesses is encouraged and developed," and that doing so requires ensuring that small businesses receive "a fair proportion of the total purchases and contracts ... for the Government." 15 U.S.C. § 631(a). The Act has two relevant features. First, it requires the President to establish annual government-wide goals for the percentage of contracts awarded to small businesses and to particular types of small businesses. *Id.* § 644(g)(1)(A). Each agency must

also set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses. *Id.* § 644(g)(1)(B).

Second, the Act requires that small businesses receive a "fair proportion" of government contracts. 15 U.S.C. § 644(a)(3). The regulations implementing that provision, which are contained in part 19 of the Federal Acquisition Regulation ("FAR"), adopt procedures for contracting officers to "set aside" some contracts, or "reserve [them] exclusively or partially for the participation" of small businesses. Nash et al., *The Government Contracts Reference Book* 456 (4th ed. 2013); *see also* 48 C.F.R. § 19.502-2(b). Congress has also amended the Small Business Act to add other set-asides in favor of particular types of small businesses, all of which are implemented in FAR part 19. *E.g.*, 15 U.S.C. § 637(m)(2) (women-owned small businesses); 48 C.F.R. § 19.1505(c) (implementing regulation).

The government-wide set-asides implemented in FAR part 19 are distinct from the VA-specific Rule of Two enacted in 38 U.S.C. § 8127(d), which is implemented in the VA-specific procurement regulations, known as the Veterans Affairs Acquisition Regulation. 48 C.F.R. ch. 8.

2. FAR part 19 and federal supply schedules

By regulation, the small business set-asides in FAR part 19 "do not apply" when a contracting officer orders goods or services from a Federal Supply Schedule ("FSS") contract. 48 C.F.R. § 8.404(a); *see also id.* § 8.405-5(a) ("the preference programs of [FAR] part 19 are not mandatory" when placing FSS orders); *id.* § 19.502-1(b) (exemption within FAR part 19 stating

that government-wide set-aside "does not apply" to FSS contracts).

FSS contracts are typically negotiated on behalf of the government by the General Services Administration and are intended to provide contracting officers with a "simplified process for obtaining commercial supplies and services." 48 C.F.R. § 8.402(a). An FSS contract requires a business to commit to providing "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." *Id.* Suppliers publish a list of "the items offered pursuant to [the] base contract, as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). "Individual agencies issue purchase orders under the base contract as needed." *Id.*

The regulatory exemption of FSS orders from the set-asides in FAR part 19 is consistent with the text of the Small Business Act, which FAR part 19 implements. Unlike the provision at issue in this case, the set-asides in the text of the Small Business Act are expressly discretionary, not mandatory. *E.g.*, 15 U.S.C. § 637(a)(1)(A) (contracting officer "in his discretion" may set aside contracts for award to § 8(a) program participants); *id.* § 637(m)(2) ("contracting officer may restrict competition" to women-owned small businesses); *id.* § 657a(b)(2)(B) (contracts "may be awarded" using set-asides for small businesses in historically underutilized business zones).

B. Amendments To The Small Business Act For Service-Disabled Veterans

1. The 1999 Veterans Act

In 1999, after finding that "[t]he United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," Congress enacted the Veterans Entrepreneurship and Small Business Development Act. Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234 ("1999 Veterans Act"). The 1999 law amended the Small Business Act to require that the President and each agency set annual goals for contracting with service-disabled veteran-owned small businesses—akin to the annual goal-setting already required for other types of small businesses. *Id.* § 502, 113 Stat. at 247-248 (amending 15 U.S.C. § 644(g)). The government-wide goal must be 3% or more. 15 U.S.C. § 644(g)(1)(A)(ii).

The purpose of the 1999 Veterans Act was to spur contracting officers to take a greater interest in awarding contracts to "veterans who sacrificed their health and limbs for our Nation." S. Rep. No. 106-136, at 2 (1999); *see also* H.R. Rep. No. 106-206, at 14 (1999) (annual goals were intended to "raise the awareness of federal procurement officials").

By all accounts, that approach failed. Federal agencies, including the VA, fell so far short of the 3% goal—itself just the bare minimum—that the Administrator of the Office of Federal Procurement Policy described the relevant statistics as "disturbing" and "unacceptable." *The State of Veterans' Employment: Hearing before the H. Comm. on Veterans' Affairs*, 108th Cong. 22 (2003) (statement of Angela B. Styles). A VA Deputy Secretary acknowledged that, even hav-

ing tripled its performance from the year before, the agency was "at 6/10 of 1 percent" for contracts awarded to service-disabled veteran-owned small businesses in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003 [et al.]: Hearing before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. 9 (2003) (statement of Leo S. Mackay, Jr.).

2. The 2003 Veterans Act

Congress responded to these failures with the Veterans Benefits Act of 2003, which amended the Small Business Act to create explicit—but discretionary—government-wide contracting preferences in favor of service-disabled veterans. Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662 ("2003 Veterans Act"). The 2003 Veterans Act permits contracting officers to set aside certain smaller contracts for small businesses owned by service-disabled veterans. 15 U.S.C. § 657f(a) ("sole source" awards). The Act also contains a discretionary form of the Rule of Two, under which a contracting officer "*may* award contracts on the basis of competition restricted to" service-disabled veteran-owned small businesses when at least two such businesses will submit offers and "the award can be made at a fair-market price." *Id.* § 657f(b) (emphasis added).

As the President explained when directing agencies to implement the law, the discretionary preferences for service-disabled veteran-owned small businesses were meant to "honor[] the extraordinary service rendered to the United States by veterans with disabilities" and to spur agencies "to significantly increase" their contracting with such businesses. Exec. Order No. 13,360, 3 C.F.R. 231, 231 (2005).

C. The 2006 Veterans Act

The combination of annual goals and discretionary tools also proved unsatisfactory. By 2006, the House Committee on Veterans' Affairs—which had initiated both the 1999 and 2003 amendments to the Small Business Act—"remain[ed] frustrated with respect to the efforts of the majority of federal agencies" and with the apparent "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006); *see H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 2 (2005) ("*2005 Hearing*") (statement of Rep. John Boozman, Chairman) ("virtually no Federal agency, including the VA, has achieved either the spirit or the will of the [1999] law," despite the discretionary tools provided in 2003). Veterans' advocates explained that existing measures were "generally ignore[d]" at federal agencies because "no real sanctions" existed to require compliance. *Id.* 11 (statement of Carl Blake, Paralyzed Veterans of America).

Rather than amend the Small Business Act yet again, the Committee set out to enact a contracting program specifically tailored to the VA, in recognition of its unique obligation to the nation's veterans. The result was the 2006 Veterans Act. Pub. L. No. 109-461, §§ 502-503, 120 Stat. 3403, 3431-3436 (codified as amended at 38 U.S.C. §§ 8127-8128).

1. Statutory text and purpose

The purpose of the 2006 Veterans Act was to ensure that veteran-owned small businesses are "routinely ... granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-

15. By doing so, Congress aimed to make the VA into an "example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." *Id.* at 16; *see 2005 Hearing* 29 (statement of Chairman Boozman) ("It is hard for us to get the other agencies to fall in line if we can't have [the VA] as a great model to say, hey, you can do this without the world falling apart.").

Subsection (a) of § 8127 requires the Secretary of the VA to set annual goals for contracting with veteran-owned and service-disabled veteran-owned small businesses. The goal for service-disabled veteran-owned small businesses must equal or exceed the government-wide goal established by the President under the Small Business Act. 38 U.S.C. § 8127(a)(3).

Congress then made a critical choice in the subsections that followed. Rather than combine those goals with purely discretionary tools—the approach that had failed in the 2003 Veterans Act—Congress enacted a VA-specific provision stating that VA contracting officers "shall" restrict competition to veteran-owned small businesses when the Rule of Two is satisfied:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable

> price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added).

The statute contemplates only two exceptions ("[e]xcept as provided in subsections (b) and (c)"), both of which are even more favorable to veteran-owned small businesses than the Rule of Two provision that would otherwise apply. Under the first, a contracting officer "*may* use procedures other than competitive procedures" to award contracts to veteran-owned small businesses below a threshold amount. 38 U.S.C. § 8127(b) (emphasis added); *see* 41 U.S.C. § 134 (threshold of $100,000). Under the second, a contracting officer "*may* award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is above $100,000 but not greater than $5 million, the contracting officer determines the business is a responsible source, and the award can be made at "a fair and reasonable price." 38 U.S.C. § 8127(c) (emphasis added). These exceptions to the Rule of Two in § 8127(d) are discretionary. A contracting officer "may" use them to award non-competitive or sole-source contracts to veteran-owned small businesses if the statutory criteria are met. If the officer decides not to use § 8127(b) or (c), then § 8127(d) still requires the officer to apply the Rule of Two.

The set-aside procedures dovetail with other provisions of the Act contemplating routine contracting with veteran-owned small businesses. The Act requires the VA to maintain a database of eligible businesses and establishes elaborate certification procedures for inclusion in the database, including penalties for misrepresentation. 38 U.S.C. § 8127(e)-(g). This ensures that VA contracting officers have a ready source of infor-

mation on eligible suppliers when applying the Rule of Two, and the VA's regulations state that "[w]hen conducting market research, VA contracting teams shall use the ... database," 48 C.F.R. § 810.001. The Act also includes a provision requiring the Secretary to "give priority to a small business concern owned and controlled by veterans" when choosing suppliers, even if the Secretary is permitted by "any other provision of law" to use a different contracting preference. 38 U.S.C. § 8128(a).

2. Implementing regulations

In 2009, the VA adopted regulations to implement the 2006 Veterans Act. *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,632-64,633 (Dec. 8, 2009) (codified at 48 C.F.R. subpt. 819.70). The regulations implementing the Rule of Two in § 8127(d) prioritize service-disabled veterans over other veterans; they also repeat and confirm the mandatory language of the statute:

> The contracting officer shall consider [service-disabled veteran-owned small business] set-asides before considering [veteran-owned small business] set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that [the Rule of Two will be satisfied].

48 C.F.R. § 819.7005(a) (emphasis added); *accord id.* § 819.7006(a) (same, for other veteran-owned small businesses).

The VA's regulations do *not* limit this mandate based on the prefatory clause in § 8127(d) or the goal-

setting provisions in § 8127(a). Instead, the three exceptions in the regulations mirror the exceptions in the statute. One permits a contracting officer to use non-competitive procedures for certain small contracts, as contemplated by § 8127(b). 48 C.F.R. § 813.106. The other two recognize that a VA contracting officer "*may* award" contracts on a sole-source basis, as contemplated by § 8127(c). *Id.* § 819.7007(a) (emphasis added) (service-disabled veteran-owned small businesses); *id.* § 819.7008(a) (veteran-owned small businesses). The regulations emphasize that use of the sole-source procedures authorized by § 8127(c) is discretionary, not mandatory: "The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer." *Id.* §§ 819.7007(b), 819.7008(b). There is no analogous provision purporting to make the Rule of Two in § 8127(d) discretionary.

The implementing regulations also do not purport to authorize contracting officers to place FSS orders without considering the Rule of Two in § 8127(d). Indeed, the regulations do not address the FSS program at all. In the preamble to its final rulemaking, however, the VA stated that it had received several requests to clarify how the proposed rules would affect FSS orders, including from commenters concerned that "failure to apply the rule to orders made under FSS contracts would severely limit the rule's effectiveness." 74 Fed. Reg. at 64,624. The VA responded that the rule "does not apply to FSS" orders because the small-business set-asides in "part 19 of the FAR ... do not apply to ... FSS acquisitions." *Id.* The VA did not address the fact that part 19 of the FAR implements only government-wide set-asides arising from discretionary language in

the Small Business Act and, by its own terms, does not apply to the VA-specific Rule of Two in § 8127(d).

3. Subsequent amendments

Congress has revisited and strengthened the 2006 Veterans Act several times. In 2008, the House Committee on Veterans' Affairs "became aware that the VA had concluded an agreement with the U.S. Army that would have the Army providing contracting services to the VA," and that the VA believed "the veteran-owned small business provisions of [the 2006 Veterans Act] did not apply to agents acting on behalf of the Department." H.R. Rep. No. 110-785, at 4-5 (2008). Congress responded to the VA's apparent effort to evade the statute by enacting § 8127(j), which requires that agents contracting on the VA's behalf agree to comply with the law "to the maximum extent feasible." Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189.

Congress also twice toughened the criteria to be certified as an eligible veteran-owned or service-disabled veteran-owned business. Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104(b)(1), 124 Stat. 2864, 2867 (2010) (additional verification requirements); Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 706, 126 Stat. 1165, 1206 (additional penalties for misrepresentation).

D. *Aldevra* Bid Protests

Notwithstanding the mandatory language of the statute and regulations, the VA continued to place orders from FSS contracts after the passage of the 2006 Veterans Act without first considering whether to conduct a set-aside for veteran-owned small business un-

der the Rule of Two. That practice triggered a slew of bid protests by veteran-owned small businesses.

A bid protest is a written objection by an interested party to a solicitation or other request by an agency for the procurement of property or services. 48 C.F.R. § 33.101. By filing a bid protest, a government contractor challenges a federal agency's violation of procurement statutes or regulations that prejudice the contractor's ability to compete for a specific contract. Bid protests may be filed with the agency conducting the procurement, the Government Accountability Office ("GAO"), or the Court of Federal Claims. *Id.* §§ 33.103-33.105.

The first bid protest over the VA's continued use of the FSS was filed with the GAO in 2011. *Matter of Aldevra*, 2011 WL 4826148, at *1 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"). The VA conceded that the Rule of Two was satisfied for at least one of the disputed procurements—that is, that two or more veteran-owned small businesses could provide the goods at fair and reasonable prices. *Id.* at *2. The VA contended, however, that it was not required to conduct the Rule of Two analysis mandated by § 8127(d) because FSS acquisitions are exempted by regulation from the government-wide small business set-asides implemented in FAR part 19. *Id.* at *3. Citing the preamble to its final rulemaking (*supra* p.17), the agency claimed that the statutory preferences "only come into play when and if the VA decides to procure from commercial sources without using FSS schedules." Letter from Dennis Kulish, VA, to Jacqueline Maeder, GAO, re *Aldevra I*, at 2 (Sept. 27, 2011) (No. B-405524).

The GAO rejected the VA's position. It observed that both the 2006 Veterans Act and the VA's own im-

plementing regulations "unequivocal[ly]" require the VA to restrict competition to veteran-owned small businesses when the Rule of Two is satisfied. *Aldevra I*, 2011 WL 4826148, at *2. As to the regulations cited by the VA, the GAO explained that the FAR exempts FSS procurements from the small business set-aside requirements of part 19, such as the government-wide, explicitly discretionary set-aside for service-disabled veteran-owned small business authorized by the 2003 Veterans Act. *Id.* at *3 (discussing 48 C.F.R. § 8.404(a)). That regulatory exemption "has no application to the [2006 Veterans Act]," which is a separate statutory scheme and which is not implemented in FAR part 19. *Id.* at *4.

The GAO confirmed its view in a second Aldevra bid protest in 2012. *Matter of Aldevra*, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"). In that protest, for the first time in "numerous" protests on the same issue, the VA offered a new argument to support its FSS procurements—namely, that because § 8127(d) contains the prefatory clause "for purposes of meeting the goals under subsection (a)," the statute requires use of the Rule of Two only when the VA decides, in its discretion, that a particular procurement should be used to further its annual contracting goals. *Id.* at *3. The VA argued that the "for purposes of" clause, which it had not cited in *Aldevra I* or its rulemaking, was actually an "extremely important" qualifier preserving the agency's discretion. Letter from Phillipa Anderson, VA, to Lynn Gibson, GAO, re *Aldevra II*, at 2, 8 (Jan. 4, 2012) (No. B-406205). The GAO also rejected that argument, noting that the clause "explains the purpose for the mandate" but "does not create an exception to the mandate." *Aldevra II*, 2012 WL 860813, at *4.

The VA declined to follow the *Aldevra* decisions or nearly twenty other GAO bid protest decisions on the same issue. GAO, *Report to Congress*, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012); *see* JA6-7 (internal VA guidance); JA8-10 (VA press release). Although the GAO's resolution of a protest is not binding, 31 U.S.C. § 3554(b), "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare," *CMS Contract Mgmt. Servs.* v. *Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014).

The standoff between the VA and the GAO ended in December 2012, after the decision of the Court of Federal Claims in this case. The GAO announced that it stood by its interpretation of the 2006 Veterans Act but that it would no longer hear bid protests on the issue because protestors could not "obtain meaningful relief" from the VA's unlawful procurements. JA41.

E. Prior Proceedings

1. Kingdomware is a small business that develops and manages web, software, and database applications for both the public and private sectors. It is owned by Timothy Barton, a veteran who served in the U.S. Army during Operation Desert Storm and sustained a service-related injury that rendered him permanently disabled. The VA has certified Kingdomware as a service-disabled veteran-owned small business. JA20, 33.

Kingdomware filed multiple bid protests at the GAO over the VA's failure to apply the Rule of Two before using the FSS for procurements. JA25-28. One of Kingdomware's protests concerned a February 2012 procurement for emergency notification services for a group of VA hospitals and clinics, which the VA awarded to an FSS supplier without considering § 8127(d).

JA30-31.[1] This occurred even though the VA contracting officer was aware at the time of the procurement that at least twenty service-disabled veteran-owned small business suppliers "were capable of meeting the requirements at issue." JA18. The GAO sustained Kingdomware's bid protests. JA19. However, as with the *Aldevra* bid protests, the VA refused to follow the GAO's decisions. JA11-12, 32.

2. Kingdomware then brought this action in the Court of Federal Claims for declaratory and injunctive relief from the VA's refusal to apply § 8127(d)'s Rule of Two before ordering from FSS suppliers. JA20, 28-29; *see* 28 U.S.C. § 1491(b)(1) (Court of Federal Claims' jurisdiction over such suits). The VA acknowledged that its contracting officer made no effort to comply with the Rule of Two for the procurement at issue. JA31.

The Court of Federal Claims nevertheless granted summary judgment to the VA. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court first found the statute to be ambiguous. In the court's view, the "for purposes of" clause in § 8127(d) and the statute's overall "goal-setting nature" "cloud[ed] the clarity" of the otherwise clear "shall award" language. Pet. App. 62a. Proceeding to the second step of *Chevron*, the court deferred to the agency's position in the preamble to its final rulemaking, which the court understood as interpreting the 2006 Veterans Act to "hav[e] no effect on [the VA's]

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[1] The VA's response to this protest made no mention of the "for purposes of" clause of § 8127(d). Instead, the agency again cited its rulemaking preamble, in which it claimed to have "interpret[ed] [the] statute in conjunction with the entire procurement system" and to have determined that "FSS acquisitions" were not "impacted" by the law. JA14.

ability to use the FSS without limitation." *Id.* 69a. At the parties' request, the court also entered judgment on two other claims brought by Kingdomware raising the same legal question as to other procurements. JA35-37.

3. A divided panel of the Federal Circuit affirmed on different grounds. Unlike the Court of Federal Claims, the panel majority "perceive[d] no ambiguity in § 8127." Pet. App. 15a. In its view, the statute "links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." *Id.* 20a. To put those provisions in what the majority described as "harmonious context" (*id.*), the majority held that "the Secretary 'shall' use Rule of Two procedures" when the VA wishes to use a procurement to meet its annual goals but "may elect to use the FSS at other times so long as the goals are met" (*id.* 15a). The majority asserted that a contrary reading would render the statutory requirement that the Secretary set goals "superfluous" because the number of contracts awarded to veteran-owned small businesses would be determined not by the goals but rather by "the success or failure of the Rule of Two in the marketplace." *Id.* 20a.

The majority also relied on extra-record statistics about VA contract awards to veteran-owned and service-disabled veteran-owned small businesses in recent years. The government submitted those statistics at the court's request after oral argument. JA42-55. The majority accepted and relied on these untested numbers to conclude that the VA had met the annual goals it was required to set for itself. Pet. App. 9a. Under that circumstance, "as long as the goals set under sub-

section (a) are met," the majority saw "no reason to compel" use of the Rule of Two. *Id.* 20a, 21a.[2]

Judge Reyna dissented. In his view, the mandatory force of the statutory language "could not be clearer" (Pet. App. 23a), and the majority's construction "guts the Rule of Two imperative" of any force (*id.* 22a). Addressing the majority's reliance on the phrase "for purposes of meeting the goals," Judge Reyna explained that "'a prefatory clause does not limit or expand the scope of the operative clause.'" *Id.* 26a; *see id.* 22a ("In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpretation of the statute regardless of our policy views."). He further explained that the majority's interpretation is undermined by the VA's own regulations, which repeat the mandatory statutory language

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[2] In fact, the statistics are inaccurate. An audit by the VA's inspector general concluded that the agency overstated its awards to veteran-owned and service-disabled veteran-owned small businesses in fiscal year 2010—the only year studied—by at least $500 million and possibly more, attributable largely to awarding and counting contracts to ineligible businesses. VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011). The audit demonstrated that the VA may have awarded as few as 6% of its contracts to veteran-owned small businesses in 2010 (*id.* 32 tbl. 5)—far short of its reported 23% and its goal of 12% (Pet. App. 9a). The government has claimed that the problems revealed by the audit were fixed by legislative changes in 2010. Opp. 8 n.2. However, the VA's senior procurement official testified to Congress *in 2015* that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisition & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015).

("shall award") and *omit* the prefatory clause ("for purposes of"). *Id.* 27a-29a.

Finally, Judge Reyna addressed the majority's reliance on the goal-setting provisions of subsection (a). In his view, the majority "overlook[ed] that participation goals are aspirations, not destinations," and thus may be exceeded without becoming superfluous. Pet. App. 30a. He also faulted the majority for "a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals." *Id.* 31a. The goals are set by the Secretary, but the Rule of Two analysis "is undertaken by the contracting officer on a contract-by-contract basis." *Id.* "Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data [on whether the agency is meeting its goals] in making contracting decisions[.]" *Id.* 27a. There is thus no practical way "contracting officers can determine that these goals have been 'met' before the end of the fiscal year." *Id.* 32a. Judge Reyna concluded that, far from rendering subsections (a) and (d) harmonious, the majority's decision "deprives the Rule of Two mandate of its force and effect," "impedes congressional objectives," and "renders § 8127(d) inoperative and unnecessary." *Id.*

The Federal Circuit denied Kingdomware's petition for rehearing en banc on September 10, 2014. Pet. App. 73a-74a.

SUMMARY OF ARGUMENT

I. The unambiguous text of § 8127(d) mandates that VA contracting officers "shall award" contracts using competition restricted to veteran-owned and service-disabled veteran-owned small businesses when the Rule of Two is satisfied. "Shall" is the language of

command, not discretion. The conclusion that § 8127(d) is mandatory is further strengthened by comparing it to the expressly discretionary language ("may use" and "may award") in § 8127(b) and (c), as well as in prior measures, the shortcomings of which led Congress to enact the 2006 Veterans Act.

The Federal Circuit's contrary view rested on a prefatory clause in § 8127(d) that states that the Rule of Two is to be used "for purposes of" meeting annual goals the VA Secretary must set under § 8127(a). The prefatory "for purposes of" clause explains the outcome Congress sought to achieve but does not limit the operative clause ("shall award"). The annual goals are a floor, not a ceiling. They promote accountability and can spur the VA to take additional action if needed, but their overarching purpose is to "increase contracting opportunities," 38 U.S.C. § 8127(a)(1), not limit them.

By ascribing operative force to the "for purposes of" clause, the Federal Circuit has left the operation of § 8127(d) unclear and unworkable. The statute cannot be read as discretionary "as long as" the goals are met. Pet. App. 20a. Such an interpretation could interfere with the grants of authority to use non-competitive procedures or sole-source awards in § 8127(b) and (c), which contain the same prefatory clause as § 8127(d). Moreover, contracting officers do not know whether the annual, agency-wide goals have been or are being met when awarding contracts. Nor can § 8127(d) be read as "mandatory" only when a contracting officer decides to use it, as the government has contended. That would effectively rewrite "shall" as "may."

The legislative history of the Act and the veterans canon further confirm what the text itself makes plain: Congress required the VA to consider veteran-owned

small business suppliers first, applying the Rule of Two, before turning to other sources of supply.

II. Because the text of the statute is unambiguous, the case should be resolved at the first step of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The second step of *Chevron* also clearly favors Kingdomware. The regulations the VA adopted to implement § 8127(d) mirror the mandatory statutory language ("shall award") and omit the "for purposes of" clause. The regulations thus show that the VA did not view the "for purposes of" clause as significant during its rulemaking, did not purport to resolve any ambiguity created by it, and instead adopted mandatory regulations that are inconsistent with its current litigating position.

Rather than rely on the regulations, the government has argued that the VA's interpretation of the statute is entitled to deference based on a preamble to the agency's final rulemaking. However, the legal reasoning of the preamble is clearly mistaken, and the government has abandoned it. The VA relied not on the "for purposes of" clause but rather on other provisions in the FAR that are inapplicable to the 2006 Veterans Act. The preamble is also not owed deference because it lacks the force of law and conflicts with the plain language of the regulation. Nor does the 2006 Veterans Act contain any gaps regarding the FSS for the agency to fill under *Chevron*.

III. Congress required the VA to apply the Rule of Two for sensible reasons that an executive agency may not second-guess. Veterans face special challenges in reintegrating into the civilian workforce, and Congress has sought to address those challenges through economic assistance, including procurement preferences. In this instance, Congress determined that a mandato-

ry Rule of Two specific to the VA is appropriate to support and encourage veteran entrepreneurship. The VA may not disregard that command.

The government's contrary policy arguments cannot override the text and are, in any event, mistaken. Applying the Rule of Two will not cause waste or inefficiency because competition is only restricted if there is a reasonable expectation that the award will be made "at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Contracting officers will not be overburdened if required to consider the Rule of Two.

Finally, the VA's inability to provide an accurate account of its annual progress in meeting its small business goals provides yet another reason to conclude, as the text indicates, that the mandate in § 8127(d) does not depend on the agency's self-reported success in achieving those goals.

ARGUMENT

I. THE TEXT, PURPOSE, AND HISTORY OF THE 2006 VETERANS ACT CONFIRM THAT THE RULE OF TWO IS MANDATORY, NOT DISCRETIONARY

A. The Plain Language Of § 8127(d) Is Mandatory

"As in all statutory construction cases," the inquiry "begin[s] with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The text of § 8127(d) is clear and unambiguous: "a contracting officer of the Department shall award contracts" to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." The plain language thus requires VA contracting officers to

consider veteran-owned small businesses first, before turning to other potential suppliers or the FSS system.

This Court has repeatedly recognized that the word "shall" signifies a command or mandatory duty, not a grant of discretion. *E.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"); *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'" (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947))); *see also United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) (with the language "'shall forfeit,'" "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"). By contrast, Congress uses "may" in a statute to confer "some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). As explained in the House drafting manual in effect when the 2006 Veterans Act was enacted, "[f]or granting a right, privilege, or power, use 'may' .... For directing that action be taken, use 'shall[.]'" *House Legislative Counsel's Manual on Drafting Style* 61-62 (1995).

To be sure, context may sometimes require reading "shall" as discretionary in exceptional circumstances. *Rodgers*, 461 U.S. at 706; *see Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432 n.9 (1995). But where "the word 'may' is used in special contradistinction to the word 'shall,' ... there can be no reason for 'taking such a liberty.'" *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895). When a single provision uses "both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson*, 329 U.S. at 485.

Section 8127 uses "may" and "shall" in precisely that contrasting way. Subsection (d) uses "shall" to indicate that VA contracting officers must conduct a restricted competition in all cases where the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." Subsections (b) and (c), by contrast, use "may" to indicate that they permit, but do not require, contracting officers to award non-competitive or sole-source contracts in lieu of restricted competition in certain cases. Thus, reading § 8127(d) in the broader context of its sibling provisions confirms that "shall award" is mandatory rather than discretionary.

The conclusion that Congress used "shall" in deliberate contrast to "may" is further strengthened by considering the predecessors to the 2006 Veterans Act. *See Rodgers*, 461 U.S. at 706-708 (drawing similar comparison). The 1999 and 2003 Veterans Acts required yearly goals and established explicitly discretionary ("may award") set-aside authority for service-disabled veteran-owned small businesses. 15 U.S.C. §§ 644(g), 657f(b). Disillusionment with that discretionary regime spurred Congress to pass the more stringent 2006 Veterans Act. For the revamped initiative, which applies exclusively to the VA and extends to all veteran-owned small businesses, Congress adapted the set-aside language from existing law and replaced "may award" with "shall award." Interpreting § 8127(d) as though it said "may" would be indefensible given that history.

B. The "For Purposes Of" Clause Does Not Limit The Rule Of Two Mandate

To avoid the plain meaning of the "shall award" language in § 8127(d), the government and the Federal Circuit relied on a prefatory clause stating that the Rule of Two is to be used "for purposes of meeting the

goals set under subsection (a)." Pet. App. 20a. However, the "for purposes of" clause does not render the Rule of Two discretionary, nor does it cause the Rule of Two to cease to apply "as long as" (*id.*) or "after" (*id.* 17a) the VA meets its goals. Such readings are unsupported by the text, unworkable in practice, and improperly transform the floor created by the annual goals into a ceiling.

1. The "for purposes of" clause is a prefatory statement of purpose

Section 8127(d)'s prefatory "for purposes of" clause simply announces one objective Congress hoped to achieve by requiring contracting officers to apply the Rule of Two: to have the VA meet its annual goals, which it had failed to do for years before Congress enacted the 2006 Veterans Act. *Supra* pp.11-13. That prefatory statement of purpose does not override or otherwise impose a cap on § 8127(d)'s operative clause, which states that "a contracting officer of the Department shall award contracts" when the requirements of the Rule of Two are met. Rather, the prefatory clause merely states an anticipated or hoped-for outcome from applying the operative clause as written.

This commonsense reading accords with the text of § 8127(a) itself, which shows that the annual goals are intended to *increase* contracting opportunities for veteran-owned small businesses, not to limit them. Subsection (a) provides: "*In order to increase contracting opportunities* for small business concerns owned and controlled by veterans ... [or] veterans with service-connected disabilities, the Secretary shall ... establish"

annual goals for contracting with such businesses. 38 U.S.C. § 8127(a) (emphasis added).[3]

Further, the Secretary must set an annual goal for service-disabled veteran-owned small businesses that is at least as high as the government-wide goal set under the Small Business Act. 38 U.S.C. § 8127(a)(3). The cross-referenced provision of the Small Business Act likewise uses open-ended language without a ceiling. 15 U.S.C. § 644(g)(1)(A)(ii) ("*not less than* 3 percent" (emphasis added)).

A plain reading of § 8127(a) thus shows that the overarching purpose of the goals is to require the agency to do more, not less. Nothing in § 8127(a) supports the idea that the goals were precise targets to be achieved but not exceeded.

This reading of the "for purposes of" clause also adheres to the well-established principle that "a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); *accord id.* at 643 n.7 (Stevens, J., dissenting); *see also Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Association of Am. Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *National Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241-242 (2d Cir. 1965);

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[3] The fact that § 8127(a) itself has a prefatory clause ("[i]n order to increase contracting opportunities") and an operative clause (the Secretary "shall ... establish" annual goals) further confirms Kingdomware's reading of § 8127(d). The "[i]n order to increase" clause cannot be sensibly read to have operative force. Doing so would suggest, for example, that the Secretary is required to set a higher goal each year because the goal must be established "to increase contracting opportunities."

2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014).

Prefatory language may be used to resolve ambiguities in the operative language, *e.g.*, *Heller*, 554 U.S. at 577-578, but it may not be used to "*create* doubt or uncertainty," 2A Singer & Singer § 47:4 (emphasis added). Here, § 8127(d)'s operative clause requiring application of the VA-specific Rule of Two is unambiguous ("shall" means "shall"), making it unnecessary to resort to the "for purposes of" clause to resolve the meaning of the mandate.

The government has sought to distinguish this long line of authority as addressing preambles, not prefatory clauses within a single statutory section. Opp. 19-20. But that distinction is unfounded; a legislature may announce its purpose wherever it chooses. *See, e.g.*, *Heller*, 554 U.S. at 578 & n.3 (prefatory clause of amendment, distinct from formal preamble); *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008) (introductory clause of § 113 of Colorado's Unfair Practices Act, distinct from declaration of purpose in § 102); *SEC* v. *Straub*, 921 F. Supp. 2d 244, 260-261 (S.D.N.Y. 2013) (non-operative "statement of purpose" at the end of statutory provision); *see also* Scalia & Garner, *Reading Law* 220 (2012) ("Expressions of purpose are usually placed [in a preface], but they do not have to be."); Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 44-45 (2d ed. 1874) ("A preamble is sometimes prefixed to a particular clause, the tenor of which it is meant to explain, or which it is intended to elucidate."); Dwarris, *A General Treatise on Statutes* 109 (Potter ed., 1871) (similar). The purpose clause here is prefatory because, by its words, it "announces a purpose." *Heller*, 554 U.S. at 577.

Interpreting a statement of purpose to limit operative language is improper because legislation commonly exceeds the problem or mischief that motivated its enactment. *See Heller*, 554 U.S. at 578 ("'It is nothing unusual in acts ... for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" (quoting Bishop, *Commentaries on the Written Laws and Their Interpretation* § 51 (1882))); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils"). For example, "if a statute provides that dogs are to be muzzled for the purpose of stamping out rabies they must continue to be muzzled so long as the statute is in force, even though rabies has been stamped out." Hibbert, *Jurisprudence* 95 (1932). By the same token, the Rule of Two still applies, regardless of whether the agency has met its goals for the year. *Infra* pp.38-40.

The Federal Circuit's stated concern that § 8127(d)'s operative clause must be limited to avoid rendering the "for purposes of" clause "superfluous" is misplaced. Pet. App. 19a-20a. Where "'the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation ..., a court has no license to make it do what it was not designed to do.'" *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (quoting *Heller*, 534 U.S. at 578 n.3). Interpreting a prefatory clause as non-limiting does not render it superfluous because the function of such a clause is simply to explain legislative action, not to expand or limit operative rights or duties.

Had Congress wanted the Rule of Two to apply only until the annual goals were met, it would have imposed an express condition, as it has done in other in-

stances. For example, under a since-discontinued program that was in effect when the 2006 Veterans Act was enacted, a participating agency was required to apply the government-wide set-asides in the Small Business Act "[i]f [the] agency has failed to attain its small business participation goal under" the program, and was required to continue applying the set-asides until "its contract awards to small business concerns meet the required goals." Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, § 713(b), 102 Stat. 3853, 3892 (codified as amended at 15 U.S.C. § 644 note (2006)), *repealed by* Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1335, 124 Stat. 2504, 2543.

Finally, the government's own pre-litigation conduct shows that even the VA did not regard the "for purposes of" clause as limiting the Rule of Two in § 8127(d). The VA *entirely omitted* any reference to the prefatory clause in its implementing regulations, which instead mirror the statutory text of § 8127(d)'s operative clause. 48 C.F.R. §§ 819.7005(a), 819.7006(a). The VA also made no mention of the "for purposes of clause" when the agency asserted an exemption for FSS procurements in the preamble to its rulemaking. *See VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). Nor did the VA rely on the clause or ascribe any operative significance to it in the "numerous" bid protests that preceded *Aldevra II*. 2012 WL 860813, at *3 (Comp. Gen. Mar. 14, 2012). Only after the GAO rejected the VA's prior, flawed rationales did the agency belatedly adopt its current view. *Id.*; *supra* p.20. If the natural reading of the purpose clause were a substantively limiting one, it would not have taken the VA over five years to discover it.

2. The statute mandates both goal-setting and application of the Rule of Two

The Federal Circuit's concern that the goal-setting provisions of § 8127(a) would be rendered superfluous also rested on a fundamental confusion about the nature and function of the goals. Congress had good reasons to require both annual goals under § 8127(a) and application of the mandatory Rule of Two in § 8127(d) without regard to whether the goals are met in any particular year.

First, annual small business goals are "aspirations, not destinations." Pet. App. 30a (Reyna, J., dissenting). Nothing in the text of the statute, the purposes behind it, or its legislative history suggests that Congress was concerned about *too much* contracting with veteran-owned small businesses, or that Congress intended the annual goals to control the force of the Rule of Two mandate. To the contrary, the stated purpose was to make sure that the VA would "meet, if not *exceed*, its contracting goals." H.R. Rep. No. 109-592, at 15 (2006) (emphasis added). By reading § 8127(d) as discretionary "so long as the goals are met" (Pet. App. 15a), the Federal Circuit improperly transformed the goals from a floor into a ceiling.

Second, contrary to the Federal Circuit's apparent belief, a mandatory set-aside does not guarantee that veteran-owned small businesses will always receive contracts in excess of the Secretary's annual goals. Veteran-owned small businesses must clear multiple hurdles before they are eligible to be considered under the Rule of Two. For example, veteran-owned small businesses are subject to elaborate certification procedures before they are eligible for VA set-asides. 38 U.S.C. § 8127(e)-(g). Also, VA contracting officers may

limit competition to veteran-owned small businesses only if there is a "reasonable expectation" of two or more offers "and that the award can be made at a fair and reasonable price that offers best value to the United States." *Id.* § 8127(d). The mandatory set-aside is no guarantee that any particular number of contracts will be awarded to veteran-owned small businesses or that the Secretary's goals will be met.

Third, the "fair and reasonable price" and "best value" requirements ensure that the Rule of Two will not cause any fiscal waste even if application of the Rule leads the agency to exceed its annual goals. "Best value" is a term of art in government contracting, requiring an outcome "that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." 48 C.F.R. § 2.101.

Fourth, the Federal Circuit failed to appreciate the sensible justifications behind setting a goal for agency leadership and a mandate for rank-and-file agency officials. Pet. App. 31a (Reyna, J., dissenting). Requiring the Secretary to establish goals allows the Secretary, Congress, and the public to measure progress and to impose accountability when the agency falls short. *See* H.R. Rep. No. 109-592, at 16 ("The Committee ... expects the Secretary to aggressively monitor the Department's performance."). The goals may also inform how the VA trains and supervises contracting officers and the priorities the VA leadership communicates to its employees. A shortfall might, for example, signal that § 8127(d) is not being implemented properly, or that the VA needs to provide additional training to its contracting officers or do additional outreach to eligible businesses. The goals can also help guide the VA's use of its discretionary authority to award contracts to veteran-owned small businesses under § 8127(b) and (c).

In sum, affording § 8127(d) its natural, mandatory reading is entirely consistent with the "overall statutory scheme" of the 2006 Veterans Act, including the Secretary's duty to set annual goals under § 8127(a). *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). "In order to increase contracting opportunities" for veteran-owned small businesses, § 8127(a) requires the Secretary of the VA to establish yearly goals for the VA to contract with veteran-owned small businesses. For purposes of meeting those goals, Congress enacted veteran contracting preferences in subsections (b) through (d). And because federal agencies had consistently failed to meet past contracting goals using existing discretionary authority and because the goals were never intended to set a ceiling, Congress required ("shall award") VA contracting officers to apply the Rule of Two in § 8127(d). The annual goal-setting and the mandatory Rule of Two work in tandem to achieve the purposes of the statute.

3. Contrary readings of the "for purposes of" clause are unworkable or indefensible

The Federal Circuit's effort to "link[]" the operative scope of the Rule of Two in § 8127(d) to the annual goals under § 8127(a) has left the statute unclear and unworkable in practice. Pet. App. 20a. Nor do any of the other interpretations of the statute suggested by the government in the course of these proceedings withstand scrutiny.

Discretionary as long as the goals are met. The panel majority stated that consideration of the Rule of Two is discretionary "as long as the goals set under subsection (a) are met." Pet. App. 20a; *see id.* 15a ("so long as the goals are met"). Elsewhere, the panel and the government stated that the Rule of Two is discre-

tionary "after" the goals are met. *See id.* 17a; Opp. 15. Both interpretations create multiple problems.

First, reading the "for purposes of" clause in § 8127(d) as turning the Rule of Two mandate off depending on whether the agency reaches its goals for the year would be problematic for § 8127(b) and (c), which both contain an identical "[f]or purposes of meeting the goals" clause. Such "'identical words and phrases within the same statute should normally be given the same meaning.'" *FCC* v. *AT&T Inc.*, 562 U.S. 397, 408 (2011). If the "purposes" clause is interpreted to mean that § 8127(d)'s mandate no longer applies if the goals are met, then it would also mean that § 8127(b) and (c) no longer apply. As a result, the VA's authority to use those discretionary provisions for sole-source awards or non-competitive contracts would also terminate—a result at odds with the purpose of the statute and the VA's practice of awarding sole-source contracts to veteran-owned small businesses in years when it claims to exceed its goals.[4]

Second, the goals are set on an annual basis by the Secretary, while procurement decisions are made year-round by individual contracting officers. As Judge Reyna explained in dissent, there is no evidence that VA contracting officers have any way of knowing whether the agency is meeting its goals when conducting a particular procurement. Pet. App. 27a.

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[4] To cite but one example, the Federal Procurement Data System shows a VA sole-source award to a veteran-owned small business even in the final month of the 2014 fiscal year, when the VA claims to have exceeded its annual goal. *See* Federal Procurement Data System-Next Generation, Transaction Report for VA Award ID VA24814P4886 (Sept. 29, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24814P4886.

Third, the panel majority offered no guidance on whether or how the Rule of Two might become mandatory if the VA falls short of its goals. Would the Rule of Two be mandatory *until* the goals are met, such that veteran-owned small businesses would have a right to protest and overturn contracts awarded at the beginning of the year when the VA goals are, almost by definition, unmet? What about contracts awarded toward the end of the year that push the percentage awarded to veteran-owned businesses back below the required threshold? Alternatively, if the Rule of Two is discretionary *as long as* the goals are met, would all bid protests have to be held until after the end of the year to see whether the VA ultimately met its annual goals? If the VA falls short, would all or only some of the protests be sustained? Or would the remedy be to hold that § 8127(d) is mandatory for some unspecified period of time?

Moreover, given past irregularities with the VA's reported contracting statistics, extensive discovery and litigation might be required for every contract that was awarded just to resolve the threshold issue of whether the VA did or did not satisfy its yearly goals. *See supra* n.2; *see also infra* pp.56-58. These practical and procedural problems contrast starkly with the simplicity of Congress's straightforward command that VA contracting officers "shall" use the Rule of Two.

Mandatory when the agency decides to use it. The government argued in the Federal Circuit that the Rule of Two in § 8127(d) applies only "if the contracting officer determines *in his or her discretion* that a specific procurement should be set aside." Resp. C.A. Br. 16 (emphasis added); *see id.* 15 (the statute "grants contracting officers discretion in meeting the Secretary's discretionary goals" (capitalization altered)). Perhaps

recognizing the tension between this position and § 8127(d)'s mandatory language, the government subsequently reframed the point to argue that the Rule of Two is the "'*mandatory* ... procedure' the VA *must* follow whenever it is contracting 'for purposes of meeting the [Secretary's] goals.'" Opp. 14 (emphases added). But despite the perfunctory label "mandatory," this interpretation does not constrain the VA's discretion.

A mandate that applies only when an agency decides to use it is not a mandate. Indeed, for a given acquisition, the statute would operate the same way if the mandatory "shall award" language in § 8127(d) were replaced with "may award." And if the function of the "for purposes of" clause were to convey that the agency has discretion to decide when to apply the mandate, there is no reason to include the same clause in § 8127(b) and (c), which are already discretionary by their plain terms ("may use" and "may award").

The natural reading of § 8127(d) is straightforward and easy to apply: VA contracting officers must set aside contracting opportunities for veteran-owned small businesses if the Rule of Two is satisfied. The unworkability, confusion, and internal contradictions that arise when departing from this plain meaning further confirm the wisdom of applying the statutory requirements as written.

C. The Legislative History And Purpose Of The Act Show That Congress Intended To Require The VA To Use The Rule Of Two

The 2006 Veterans Act emerged from years of failed efforts by federal agencies—including the VA—to use discretionary tools Congress already provided to achieve annual goals Congress already required them to set. H.R. Rep. No. 109-592, at 15-16. A frustrated

Congress responded by "rectify[ing] that as far as the VA is concerned." *2005 Hearing* 2 (statement of Chairman Boozman). As a result of the 2006 Veterans Act, Congress "expect[ed] VA to set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." H.R. Rep. 109-592, at 16. The Act thus established § 8127(d)'s unique, VA-specific set-aside to ensure that veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts." *Id.* at 14-15.

The Federal Circuit disregarded the clear indications that Congress did not intend to establish yet another discretionary set-aside essentially identical to the previously unsuccessful ones. It relied instead on portions of the legislative history taken out of context to override the plain meaning of the text. Pet. App. 20a-21a. For example, the majority relied on a statement in a committee report referring to "'the discretionary, not mandatory, nature of the goals'" (*id.* 20a), even though that statement was actually a reference to the *problems* that existed in the past, not an explanation of how the 2006 Act was intended to operate, H.R. Rep. No. 109-592, at 15.

The government fares no better with its reliance on a joint statement issued by the House and Senate Committees on Veterans' Affairs. Opp. 20. The Committees explained that in some circumstances VA contracting officers "would be allowed to award non-competitive contracts" to veteran-owned small businesses under § 8127(b) and would be "allowed, but not required, to award sole source contracts" to such businesses under § 8127(c). 152 Cong. Rec. 23,509, 23,515 (2006). The Committees then explained, in a sentence plucked out of context by the government, that

"[c]ontracting officers would retain the option to restrict competition" using the Rule of Two under § 8127(d). *Id.* That is not a general description of the Rule of Two as merely an "option," but rather a recognition that the Rule of Two may be used even when circumstances permit use of the discretionary sole-source or non-competitive provisions in the statute.

These cherry-picked portions of the legislative record confirm the wisdom of this Court's adage that legislative history is "of minimal, if any, relevance" when the language of the statute "leaves little doubt as to Congress' intent." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 298 (1995). Even if the government were able to identify snippets of legislative history to support its reading, other aspects of the legislative history point the other way, and the plain text of the law as actually passed should be given controlling weight.

D. The Veterans Canon Also Weighs In Favor Of Reading § 8127(d) As Mandatory

If the text of § 8127(d) were ambiguous, the canon of construction in favor of veterans would require that any "interpretive doubt ... be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994). When Congress enacts legislation to benefit "those who left private life to serve their country," the legislation "is to be liberally construed" in favor of the veterans Congress sought to reward. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)); *see also Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011). Applying that canon here confirms that the Rule of Two is mandatory, not discretionary.

The government has sought to avoid application of this settled canon by claiming that the 2006 Veterans Act is a "government-contracting statute," "not a benefits statute" (Opp. 21 n.5), but that distinction is illusory. The veterans canon is not limited solely to statutes involving direct government benefits. *E.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (applying canon to statute addressing right of civilian reemployment). The purpose of veteran small business preferences, like the statute in *King* and other forms of more direct assistance, is to reward those "who sacrificed their health and limbs for our Nation." S. Rep. No. 106-136, at 2 (1999). Section 8127 was enacted along with an array of other veterans benefits. *See, e.g.*, 2006 Veterans Act, Pub. L. No. 109-461, §§ 201-217, 120 Stat. 3403, 3409-3429 (healthcare); *id.* §§ 301-307, 120 Stat. at 3425-3429 (educational benefits); *id.* §§ 701-710, 120 Stat. at 3439-3441 (assistance to homeless veterans). Indeed, testimony at the hearings on § 8127 specifically noted that "veterans' benefits have always included assistance in creating and operating veteran-owned small businesses." *2005 Hearing* 19 (statement of Joseph C. Sharpe, Jr., American Legion). Like other veterans benefits, the Rule of Two in § 8127(d) should be liberally construed in favor of the veterans whom Congress sought to assist.

II. THE VA'S REGULATIONS FURTHER CONFIRM THAT THE RULE OF TWO IS MANDATORY AND UNDERCUT ANY ARGUMENT FOR DEFERENCE TO THE VA'S LITIGATING POSITION

A. There Is No Need To Proceed Beyond The First Step Of *Chevron*

Resolving the question presented does not require the Court to consider the agency's implementing regu-

lations or any canons of administrative deference. The first question the Court must confront is "always ... whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984). If "'the intent of Congress is clear'" after "applying the ordinary tools of statutory construction," then "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843).

As set forth above, the text, purpose, and history of the 2006 Veterans Act all demonstrate that the Rule of Two in § 8127(d) is mandatory, not discretionary, and that the Rule applies without regard to the agency's preference for using the FSS system or its progress in meeting the annual goals it sets for itself under § 8127(a). Thus, there is no reason to proceed beyond the first step of *Chevron*.[5] On this "pure question of statutory construction," the meaning of the statute is clear and "must be given effect." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). The Court should reverse the judgment below on this basis alone.

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[5] The veterans canon provides an additional reason to resolve the case at the first step of *Chevron*: Any ambiguity should be resolved in favor of the veterans whom § 8127(d) is intended to benefit. *Supra* pp.43-44. The application of such canons can clarify the meaning of a statute so "there is, for *Chevron* purposes, no ambiguity ... for [the] agency to resolve." *INS* v. *St. Cyr*, 533 U.S. 289, 321 n.45 (2001) (presumption against retroactivity); *see, e.g.*, *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (Indian canon of construction).

B. The Language Of The VA's Own Regulations Is Mandatory

Even if the statutory language were ambiguous, the second step of *Chevron* clearly favors Kingdomware. The implementing regulations mirror the mandatory statutory language and *omit* the "for purposes of" clause on which the government now rests its case. Indeed, the "for purposes of" clause appears nowhere in any of the regulations implementing the 2006 Veterans Act. 48 C.F.R. subpt. 819.70. The plain text of the regulations thus confirms that the Rule of Two in § 8127(d) is mandatory.

The relevant regulations, 48 C.F.R. §§ 819.7005(a) and 819.7006(a), are identical, except that § 819.7005(a) addresses service-disabled veteran-owned small businesses and § 819.7006(a) addresses veteran-owned small businesses. Both provide that set-asides for the former are given priority over the latter. *Id.* §§ 819.7005(a), 819.7006(a). The regulations then unambiguously mandate application of the Rule of Two, as the statutory text requires:

> Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible [service-disabled veteran-owned small business] concerns; and
>
> (2) Award will be made at a fair and reasonable price.

Id. § 819.7005(a) (emphasis added); *see id.* § 819.7006(a) (same rule for veteran-owned small businesses).

The regulations do not purport to limit this mandate based on whether the VA has achieved its annual contracting goals, nor do they contain any suggestion that a contracting officer has discretion to decide whether to apply the Rule of Two to meet those goals. The three stated exceptions, 48 C.F.R. §§ 813.106, 819.7007, and 819.7008, implement the non-competitive procedures and sole-source awards authorized by 38 U.S.C. § 8127(b) and (c) below certain threshold amounts. *Supra* pp.15, 30. By providing for only these exceptions, the regulations implementing the Rule of Two mirror the text of § 8127(d), which requires application of the Rule of Two "[e]xcept as provided in subsections (b) and (c)." Moreover, the mandatory language of the regulations implementing § 8127(d) ("shall") contrasts with the discretionary language of the regulations implementing § 8127(b) and (c) ("may"). 48 C.F.R. §§ 813.106, 819.7007-819.7008

The regulations thus confirm that § 8127(d) is neither ambiguous nor discretionary and, even if it were, the regulations themselves would dictate mandatory application of the Rule of Two. It was presumably for that reason that the Federal Circuit strained to hold that its counterintuitive interpretation of § 8127(d) was "'unambiguously'" required by the statutory text. Pet. App. 15a (quoting *Chevron*, 467 U.S. at 843). Had the panel proceeded to *Chevron*'s second step, it would have needed to confront the fact that the government's reliance on the "for purposes of" clause as a key part of the operative command in the statute is "belied" by the text of the regulations, which omit that clause and which "unequivocally require the VA to conduct a Rule

of Two analysis in every procurement." *Id.* 27a, 28a (Reyna, J., dissenting).

The government has thus effectively boxed itself into the first step of *Chevron*. Its central claim is that the mandatory force of "shall" in § 8127(d) is qualified by the "for purposes of meeting the goals" clause. Opp. 13. But the VA did not view that clause as significant during its rulemaking, did not purport to resolve any ambiguity created by it, and instead adopted mandatory regulations that are completely inconsistent with its current litigating position. The only way the government can now prevail before this Court on its goals-based interpretation of § 8127(d) is to prove that the statute unambiguously favors its position—an unreasonable and unpersuasive reading that should be rejected.

C. The VA's Attempt To Create An Exception For FSS Orders Is Not Entitled To Deference

1. Rather than rely on the regulations, the government has previously argued that the agency's view that it "may continue to use the FSS without regard to the Rule of Two" is entitled to deference based on a preamble to the agency's final rulemaking. Opp. 21. In the preamble, the VA asserted that the Rule of Two "does not apply to FSS task or delivery orders." 74 Fed. Reg. at 64,624; *see supra* p.17. However, the preamble is not entitled to any form of deference for several reasons. If anything, the preamble demonstrates that the government's effort to pour operative force into the "for purposes of" clause is merely a post hoc litigating position, not a considered exercise of the agency's discretion.

First, and most importantly, the preamble does not address or even mention the "for purposes of" clause and was instead premised on flawed legal reasoning that the agency later abandoned. It thus not only fails to resolve any putative textual ambiguity created by the "for purposes of" clause for *Chevron* purposes, but also lacks even the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The preamble addressed comments the agency received seeking clarification of the Rule of Two's application to FSS orders. 74 Fed. Reg. at 64,624. The agency stated that no clarification was needed because "this rule does not apply to FSS task or delivery orders," and "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Id.*

That reasoning is clearly erroneous. It is true that the regulations governing the government-wide FSS program—the "48 CFR part 8 procedures" referenced in the preamble—provide that the small business set-asides contained *in FAR part 19* "do not apply" to FSS orders. 48 C.F.R. § 8.404(a); *see also id.* § 19.502-1(b).[6] But the government-wide set-asides in FAR part 19 implement the discretionary statutory language in the Small Business Act, not the VA-specific 2006 Veterans Act. *Supra* pp.9-10. As the GAO explained, those reg-

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[6] Because of subsequent legislative and regulatory changes, contracting officers across the government in fact may now apply FAR part 19 small business set-asides when using the FSS program, although they are not required to do so. Small Business Jobs Act § 1331, 124 Stat. at 2541; 48 C.F.R. § 8.405-5(a)(1). By contrast, § 8127(d) requires VA contracting officers to consider the Rule of Two for all procurement contracts.

ulations have no bearing on whether § 8127(d) itself compels the VA to apply the Rule of Two before considering other procurement procedure. *Aldevra I*, 2011 WL 4826148, at *3-4 (Comp. Gen. Oct. 11, 2011).

The government tacitly conceded this error by abandoning the reasoning of the preamble after *Aldevra I*, in favor of its current interpretation centered on the "for purposes of" clause. *See Aldevra II*, 2012 WL 860813, at *3; *supra* p.20. Thus, the government's current explanation of *why* the 2006 Veterans Act should be read to preserve the agency's discretion is simply "a *post hoc* justification adopted in response to litigation," *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013), and not "a reasoned and consistent view" of the statute, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213.

Second, even setting aside the agency's legal error, the preamble "'do[es] not warrant *Chevron*-style deference'" because it is not a "regulation[] with the force of law." *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013). The view expressed in the preamble appeared for the first time in the final rulemaking, "without offering ... interested parties notice or opportunity for comment," *Wyeth* v. *Levine*, 555 U.S. 555, 577 (2009), thus circumventing the formal procedures Congress imposed "to foster the fairness and deliberation that should underlie a pronouncement" before *Chevron* typically applies, *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). In these circumstances, no deference is warranted. *See, e.g.*, *Wyeth*, 555 U.S. at 577 (declining to defer to FDA's preamble to a final rule).

Third, the preamble is not owed deference because it conflicts with the regulations, which are mandatory and do not contain any exception for FSS orders. Language in the preamble to a rulemaking "is not controlling over the language of the regulation itself." *Wyoming Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999); *cf. Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (in interpreting rules as well as statutes, the Court should be "bound by *what they say*").

For that reason, and contrary to the government's view (Opp. 21), the preamble cannot be construed as an interpretation of the regulation entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). Deference to an agency's understanding of its regulations is "warranted only when the language of the regulation is ambiguous," *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), which is not the case here. An agency may not, "under the guise of interpreting a regulation," effectively rewrite it. *Id.* The VA's regulations do not contain (and the statute does not permit) any exception for FSS orders, and the VA may not create one by fiat in a preamble to its rulemaking.

Auer deference is also inapplicable because, as explained above, the relevant discussion in the preamble actually concerns government-wide procurement regulations in the FAR—regulations not promulgated by the VA, based on statutes not entrusted to the VA to administer. *Cf. Gonzales* v. *Oregon*, 546 U.S. 243, 266-267 (2006). The preamble is not the VA's interpretation

of its own regulation, but rather the VA's misinterpretation of other agencies' regulation.[7]

2. The government has also suggested at times that the 2006 Veterans Act is ambiguous because "it does not address the effect of the 2006 Act upon the FSS," allegedly leaving "a 'legislative gap for the agency to fill.'" Resp. C.A. Br. 29. The Court of Claims appeared to endorse that rationale, observing that the statute is "silent as to the relationship between its set-aside provision and the FSS." Pet. App. 62a. However, the fact that § 8127(d) does not contain an exception for FSS orders means that there is no such exception, not that the statute is ambiguous.

Congress prescribed a particular procedure that VA contracting officers must follow when awarding procurement contracts: Officers "shall" consider the Rule of Two. 38 U.S.C. § 8127(d). Requiring this specific procedure is, by implication, a "'negative of any other'" procedure. *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 20 (1979). Where, as here, a statute's text "clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996). The 2006 Veterans Act thus does not contain any gap for the VA to fill.

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[7] The FAR is promulgated under the authority of the Department of Defense, the General Services Administration, and NASA. 48 C.F.R. § 1.103(b).

III. Congress Required The VA To Apply The Rule Of Two For Sensible Reasons That An Executive Agency May Not Second-Guess

A. Congress Determined That The Rule Of Two Is Necessary And Desirable

1. The 2006 Veterans Act was the culmination of years of congressional efforts to correct the "culture of indifference" among federal contracting officers with regard to promoting contracting opportunities for small businesses owned by service-disabled veterans. H.R. Rep. No. 109-592, at 15. Congress imposed a mandatory Rule of Two, specific to the VA, only after a combination of annual goals and discretionary tools failed to produce the level of contracting that Congress judged to be desirable. *Supra* pp.11-13. That policy choice belonged to Congress, not the executive branch, and any "appraisal of the wisdom or unwisdom of [the] particular course consciously selected by the Congress" must be set aside in interpreting the statute. *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Congress had ample reason to make the choice it made.

Economic assistance to military veterans after their service ends is a longstanding national commitment, traceable to "veterans benefit packages created by the Continental Congress." Sherman, *Note, Paved with Good Intentions*, 36 Pub. Cont. L.J. 125, 126 (2006). "Much of the legislation in this area has focused on assisting veterans in reentering the workforce and starting small businesses." *Id.* (citing examples).

For a variety of reasons, veterans face special challenges in reintegrating into the civilian workforce and experience above-average unemployment rates. Starting a small business can be an effective way for service-disabled veterans, in particular, to "customize their

employment to accommodate their challenges" and to maximize their talents, Shaheen & Myhill, *Entrepreneurship for Veterans with Disabilities* 2 (Oct. 2009), which may not be immediately recognized by civilian employers. Veterans are "more likely to be entrepreneurs" than non-veterans and are "at least 45 percent more likely than those with no active-duty military experience to be self-employed." Interagency Task Force on Veterans Small Business Development, *Heroes on the Home Front* 1 (Nov. 2012). They own millions of small businesses and create millions of jobs for others, often seeking to hire other veterans. *Id.*; *see* Camacho, *The Status and Needs of Small Businesses Owned and Controlled by Disabled Veterans* 80-81 (Nov. 2000).

Congress was well justified in concluding, as a matter of veterans policy, that a mandatory Rule of Two specific to the VA is appropriate to support and encourage veteran entrepreneurship. The VA procures approximately $18 billion of goods and services annually, making it one of the single most important sources of government contracts. National Contract Management Association, *2013 Annual Review of Government Contracting* 5 (2014). But inertia and "cultural problem[s]" relating to an irrational "lack of faith" in the capabilities of "disabled veterans" favor existing suppliers. *2005 Hearing* 24 (statement of John K. Lopez, Association for Service Disabled Veterans); *see also* H.R. Rep. 109-592, at 15. Congress recognized that the VA has a unique duty to shake off that inertia and those prejudices and to create opportunities for service-disabled veteran-owned and veteran-owned small businesses to establish themselves. Contracting with the VA can serve as a launching pad for these businesses, incubating them to grow and expand.

Moreover, Congress clearly envisioned that the VA-specific Rule of Two in § 8127(d) would foster contracting opportunities with other agencies as well. A central purpose of the 2006 Veterans Act was to transform the VA into a model agency to "set the example among government agencies for procurement with" veteran-owned and service-disabled veteran-owned small businesses. H.R. Rep. No. 109-592, at 16; *see supra* p.14. That purpose will be undermined if the government's discretionary reading of the statute prevails, and the VA is encouraged to do the bare minimum to meet its annual goals.

2. The government has contended that concerns for efficiency and administrative convenience favor its reading of the statute (Opp. 12, 15-17), but such "policy preferences" cannot alter the plain text, *Barnhart*, 534 U.S. at 461-462. Congress already made the relevant policy decision when it chose to favor veterans and enacted a clear and unambiguous mandate requiring application of the Rule of Two. The agency's contrary view of procurement policy is no basis for disregarding Congress's command.

The government's policy arguments are also unfounded. The statute automatically protects the public treasury. Under the Rule of Two, competition is only restricted if there is a reasonable expectation that the award will be made "at a *fair and reasonable price* that offers *best value to the United States*." 38 U.S.C. § 8127(d) (emphases added).

Nor will contracting officers be overburdened if required to consider the Rule of Two. The 2006 Veterans Act requires the VA to maintain a database of eligible veteran-owned and service-disabled veteran-owned small businesses. 38 U.S.C. § 8127(e)-(f); *supra* pp.15-

16.[8] The database ensures that contracting officers already have at their fingertips a list identifying companies eligible for consideration under the Rule of Two. Furthermore, as Judge Reyna explained, contracting officers will retain considerable discretion to determine whether the conditions of the Rule of Two are met for any particular procurement. Pet. App. 30a-31a.

Congress also provided a ready alternative to the Rule of Two for smaller value contracts. Section 8127(d) expressly permits contracting officers to use non-competitive procedures, 38 U.S.C. § 8127(b), or sole-source awards, *id.* § 8127(c), for contracts falling below certain threshold amounts. If the VA is genuinely concerned about the administrative costs of considering the Rule of Two for some small contracts relative to the value of those contracts, it has the discretion to use these alternatives. It does not have the discretion to ignore the unambiguous mandate in § 8127(d).

B. The VA's Difficulties Accurately Reporting Its Small-Business Contract Awards Confirm The Wisdom Of Congress's Choice

The VA's inability or unwillingness to accurately measure its annual progress in meeting its small business goals provides yet another reason to conclude, as the text indicates, that § 8127(d)'s mandate does not depend on the agency's self-reported success in achieving those goals.

The Federal Circuit concluded, wrongly, that Congress had "link[ed] the Rule of Two mandate ... in sub-

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[8] Consulting the database is already a mandatory part of pre-acquisition market research for VA contracting officers. 48 C.F.R. § 810.001.

section (d) to the goals set under subsection (a)," after soliciting and receiving extra-record statistics from the agency purporting to show that it had consistently exceeded its goals. Pet. App. 9a, 20a; JA56. At the time the government submitted those statistics, an internal audit had already found that the figures the government provided were overstated as to at least 2010 and likely other years. *Supra* n.2. Accurately counted, the VA may well have missed its goals.

The integrity of the VA's reported success in meeting its goals was further undermined by congressional testimony after the decision below. The VA's senior procurement official testified to Congress in 2015 that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisition & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015); *see also* Rein & Wax-Thibodeaux, *Official: VA Improperly Spent $6 Billion on Care*, Wash. Post, May 14, 2015, at A3 (describing Frye's account of a "culture of 'lawlessness and chaos'" and orders placed from supply contracts "for higher prices ... 'indiscriminately and not in accordance' with acquisition laws").

The recent revelations are not the first time Congress has learned of apparently intentional efforts by the VA to avoid small business set-asides. In 2008, Congress passed the Veterans' Benefits Improvement Act in part to stop perceived efforts by the VA to evade the 2006 Veterans Act by delegating purchasing authority to agents. Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189 (2008); *supra* p.18. The statute now requires that agents contracting on the VA's behalf agree

"to the maximum extent feasible" to comply with the agency's small business obligations. 38 U.S.C. § 8127(j).

Whether this troubled history was the result of deliberate misconduct or mere accident, it illustrates why Congress did *not* tie the operative force of § 8127(d) to the annual goals the agency sets under § 8127(a). Indeed, questions about the reliability of the VA's data arose at the hearings on the 2006 Veterans Act. *E.g.*, *A Proposed Amendment to H.R. 3082 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 41 (2006) (statement of John K. Lopez, Association for Service Disabled Veterans). The agency's reported progress in meeting its goals will always be at best imprecise, given the complexities of accounting for billions of dollars of procurements. And transforming the goals into the ceiling at which the Rule of Two ceases to be mandatory will create incentives for the agency to overstate its annual progress and may give operative effect to mistaken statistics.

At a minimum, the inaccuracies in the VA's data revealed by the 2010 audit and the recent congressional testimony preclude affirming the judgment below. The Federal Circuit held that the Rule of Two is not mandatory "as long as the goals ... are met." Pet. App. 20a. That interpretation should be rejected. If it is not, the Court should remand for additional factfinding on whether the agency has failed to meet its annual goals, which would cause application of the Rule of Two in § 8127(d) to be mandatory even under the Federal Circuit's flawed construction.

* * *

America's veterans have made tremendous sacrifices for their country. A mandatory Rule of Two for

veteran-owned small businesses when contracting with the VA is a small but significant measure of respect and gratitude for that sacrifice. The government's contrary position contradicts the text of § 8127(d), defies congressional policy, and disserves the nation's veterans.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Department of Veterans Affairs permissibly concluded that 38 U.S.C. 8127 did not require it to utilize a small-business contracting preference before placing an order under a pre-existing Federal Supply Schedule contract.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement:
A. Government procurement background 2
B. The Department of Veterans Affairs 13
C. The 2006 Veterans Act and the VA's regulations 14
D. Facts and procedural history 18
Summary of argument 20
Argument:
The VA can place orders under pre-existing FSS contracts without applying Section 8127's preference for awarding new contracts 23
A. Section 8127 does not override the VA's ability to place FSS orders without applying small-business contracting preferences 23
1. Section 8127(d) imposes a mandate 24
2. Section 8127(d)'s text and context show that it does not apply when the VA places orders under pre-existing FSS government contracts 25
3. Section 8127's structure confirms that the VA does not "award contracts" within the meaning of Section 8127(d) when it places FSS orders 31
4. The FAR's prior treatment of similarly mandatory contracting preferences confirms that the VA retains its authority to place FSS orders without applying contracting preferences for SDVOSBs and VOSBs 33
5. Requiring the VA to apply Section 8127 before placing FSS orders would seriously impair the agency's ability to deliver high-quality care to veterans 39

Table of Contents—Continued: Page

6. The VA's procurement regime, including the agency's continued placement of orders under pre-existing FSS contracts, is consistent with the purposes of Section 8127 44
7. The pro-veteran canon of statutory construction is inapposite here 46

B. The VA's interpretation of Section 8127 warrants judicial deference 47

C. Petitioner's suggestion that the VA may not have achieved the Secretary's SDVOSB and VOSB contracting goals for prior years provides no basis for reversing the judgment below 50

Conclusion 53

Appendix A — Statutory provisions 1a

Appendix B — Regulatory provisions 30a

TABLE OF AUTHORITIES

Cases:

Aldevra:

B-405271, 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) 41

B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) 19, 41

Auer v. *Robbins*, 519 U.S. 452 (1997) 50

Boone v. *Lightner*, 319 U.S. 561 (1943) 47

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 26

Bridges Sys. Integration, LLC, B-411020, 2015 CPD ¶ 144 (Comp. Gen. Apr. 23, 2015) 28

Burden v. *Shinseki*, 727 F.3d 1161 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 2134 (2014) 47

Card Tech. Corp., B-275385, 97-1 CPD ¶ 76 (Comp. Gen. Feb. 18, 1997) 29

Cases—Continued: Page

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 20, 47
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 26
Crandal v. *Ball, Ball & Brosamer, Inc.*, 99 F.3d 907 (9th Cir. 1996) 51
DGR Assocs., Inc. v. *United States*, 94 Fed. Cl. 189 (2010) 35
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 23
Graham Cnty. Soil & Water Conservation Dist. v. *United States*, 559 U.S. 280 (2010) 24
Honeywell, Inc. v. *United States*, 870 F.2d 644 (Fed. Cir. 1989) 19
Information Ventures, Inc., B-294267, 2004 CPD ¶ 205 (Comp. Gen. Oct. 8, 2004) 40
J.H. Rutter Rex Mfg. Co. v. *United States*, 706 F.2d 702 (5th Cir.), cert. denied, 464 U.S. 1008 (1983) 38, 51
King v. *Burwell*, 135 S. Ct. 2480 (2015) 23
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 46
Lanier Bus. Prods., B-187969, 77-1 CPD ¶ 336 (Comp. Gen. May 11, 1977) 27
Logan v. *United States*, 552 U.S. 23 (2007) 33
Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) 26
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 50
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 47
Smith v. *United States*, 508 U.S. 223 (1993) 23
Tyler Constr. Grp. v. *United States*, 570 F.3d 1329 (Fed. Cir. 2009) 32
United States v. *Oregon*, 366 U.S. 643 (1961) 46

Cases—Continued: Page

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 31
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 23

Statutes and regulations:

Act of June 17, 1910, ch. 297, § 4, 36 Stat. 531 6
Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221, 92 Stat. 1771 35
Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 303(b), 102 Stat. 3869 38
Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3338 36
Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377:
§ 101(a), 63 Stat. 379 6
§ 102(a), 63 Stat. 380 6
§ 502(a)(29), 63 Stat. 401 6
HUBZone Act of 1997, Pub. L. No. 105-135, § 602, 111 Stat. 2627 38
Small Business Act of 1953, ch. 282, Tit. II, 67 Stat. 232, as amended, 15 U.S.C. 631 *et seq.* 7
15 U.S.C. 637(a) 9, 20, 25, 10a
15 U.S.C. 637(a)(1)(D) 26, 11a
15 U.S.C. 637(m) 9, 20, 25, 13a
15 U.S.C. 637(m)(2) 26, 13a
15 U.S.C. 644(a) 8, 20, 25, 14a
15 U.S.C. 644(g)(1)(A) 7, 15a
15 U.S.C. 644(g)(1)(A)(i) 7, 16a
15 U.S.C. 644(g)(1)(A)(ii) 15, 44, 16a
15 U.S.C. 644(g)(1)(A)(ii)-(v) 9, 16a

Statutes and regulations—Continued: Page

15 U.S.C. 644(g)(1)(B) 8, 9, 32, 17a
15 U.S.C. 644(g)(2)(A) 7, 17a
15 U.S.C. 644(j) ..... *passim*, 18a
15 U.S.C. 644(j)(1) 8, 26, 34, 18a
15 U.S.C. 644(r) 29, 36, 19a
15 U.S.C. 644(r)(2) 28, 36, 19a
15 U.S.C. 657a 9, 20, 25
15 U.S.C. 657a(b)(2)(A) (2006) 26, 20a
15 U.S.C. 657a(b)(2)(B) (2006) 26, 34, 21a
15 U.S.C. 657f 9, 14, 20, 25, 21a
15 U.S.C. 657f(a) 26, 44, 21a
15 U.S.C. 657f(a)(1)-(3) 45, 22a
15 U.S.C. 657f(b) 26, 44, 22a
Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, § 713(b), 102 Stat. 3892, repealed by Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1335, 124 Stat. 2543 51
Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504:
§ 1331, 124 Stat. 2541 (15 U.S.C. 644(r)) 12
§ 1347(b)(1), 124 Stat. 2457 35
§ 1347(c)(1), 124 Stat. 2457 35
Small Business Programs Reauthorization Act of 2000, Pub. L. No. 106-554, App. I, § 811, 114 Stat. 2763A-708 38
Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2662 38
Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 2

Statutes and regulations—Continued: Page

38 U.S.C. 8127 ..... *passim*, 1a
38 U.S.C. 8127(a) 14, 20, 25, 31, 48, 1a
38 U.S.C. 8127(a)-(d) 44, 1a
38 U.S.C. 8127(a)(1) 14, 1a
38 U.S.C. 8127(a)(3) 15, 1a
38 U.S.C. 8127(b) ..... *passim*, 2a
38 U.S.C. 8127(b)-(c) 45, 2a
38 U.S.C. 8127(b)-(d) 31, 2a
38 U.S.C. 8127(c) ..... *passim*, 2a
38 U.S.C. 8127(d) ..... *passim*, 3a
38 U.S.C. 8127(e) 16, 44, 3a
38 U.S.C. 8127(f) 16, 3a
38 U.S.C. 8127(f)-(h) 16, 3a
38 U.S.C. 8127(f)(4) 44, 4a
38 U.S.C. 8127(g) 16, 5a
38 U.S.C. 8127(h) 16, 6a
38 U.S.C. 8127(i) 16, 24, 30, 33, 35, 45, 6a
38 U.S.C. 8127(i)(1) 24, 7a
38 U.S.C. 8127(i)(2) 24, 7a
38 U.S.C. 8127(j) 16, 7a
38 U.S.C. 8128 ..... 14, 9a
38 U.S.C. 8128(a) 16, 9a
Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868 52
10 U.S.C. 2302(1) 2
10 U.S.C. 2304 2
18 U.S.C. 4121 4
18 U.S.C. 4124(a) 4
28 U.S.C. 1491(b)(1) 19
31 U.S.C. 1535(a) 4

Statutes and regulations—Continued: Page

31 U.S.C. 3552(a) 18
38 U.S.C. 301(b) 13
38 U.S.C. 8125 30
38 U.S.C. 8125(a) 30
38 U.S.C. 8125(e)(1) 30
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Pt. 5 (Supp. 1960):
Sections 5.100-5.105 38
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Section 1-1.706-5(a) 38
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Pt. 101 (1965):
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Section 101-26.408-4(b) 38
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Section 52.7 7
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Pt. 1 (2011) 13, 30a
Section 1.101 13
Section 1.303(a) 13, 23, 48, 30a

Regulations—Continued: Page

Pt. 2 (2011) 13
Section 2.101 ..... 3, 6, 27
Pt. 5 (2011) 29
Section 5.101(a)(1) 3
Section 5.201(b)(1) 3
Section 5.203(a) 3
Section 5.203(b) 3
Section 5.203(c) 3
Pt. 6 (2011) 29
Section 6.204-6.207 9
Section 6.303-1 44
Section 6.303-2 44
Section 6.304 44
Pt. 8 (1984):
Section 8.001(a) 9
Pt. 8 (1986):
Section 8.001(a) 27
Section 8.404(a) 27
Pt. 8 (1994):
Section 8.404(a) 29, 36
Pt. 8 (2011) ..... *passim*
Section 8.000 ..... 4, 31a
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Section 8.002(a) 10, 11, 17, 27, 31, 48, 31a
Section 8.002(a)(1) 10, 31a
Section 8.002(a)(2) 10, 32a
Section 8.003 ..... 9, 10, 33a
Section 8.401 ..... 13, 27
Section 8.402(a) 4, 5, 29, 34a
Section 8.402(c) 6

Regulations—Continued: Page

Section 8.402(d)....6
Section 8.404(a)....5, 11, 17, 27, 29, 49, 35a
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Section 8.404(c)....27, 36a
Section 8.404(d)....11, 27, 36a
Section 8.404(e)....27
Section 8.405....11, 37a
Section 8.405-1(c)-(d)....39
Section 8.405-1(c)(1)....6
Section 8.405-1(d)(3)(ii)....6
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Section 8.405-2(c)....39
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Section 8.405-2(c)(3)(iii)(B)....6
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Section 8.004(a)(1)....4
Section 8.405-5(a)....12
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Pt. 10 (2011):

Section 10.002....40

Pt. 13 (2011)....3, 11, 29
Section 13.000....3
Section 13.003(a)....3
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Section 13.105(a)....3
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Section 13.106-3(a)....3

Regulations—Continued: Page

Section 13.302-1 3
Section 13.302-5 3
Pt. 14 (2011) 3, 11, 29
Section 14.201-1 3
Pt. 15 (2011) 3, 11, 29
Section 15.204 3
Pt. 16 (2011):
Section 16.505(a)(1) 29
Pt. 17 (2011):
Section 17.500(b) 6
Section 17.502-1(a)(2) 32
Section 17.502-1(a)(2)(ii)(A) 6
Pt. 19 (1986):
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Pt. 19 (2011) ..... *passim*, 38a
Section 19.203(a) 9, 39a
Section 19.203(a)-(c) 24, 25, 39a
Section 19.502-1(b) 9, 11, 17, 49, 42a
Section 19.502-2(a) 8, 42a
Section 19.502-2(b) 8, 43a
Section 19.502-4(a) 8, 44a
Section 19.1405(a) 45
Pt. 19 (2014):
Section 19.502-4(c) 12
Pt. 38 (2011) 11
Section 38.101(a) 5, 45a
Section 38.101(c) 28, 46a
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Regulations—Continued: Page

Section 38.101(e) 10, 12, 28, 29, 50, 46a
Pt. 219 (2011) 49
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Section 801.101(b) 48
Pt. 801 (2011) 13, 47a
Section 801.000 ..... 13, 47a
Section 801.100(b) 13
Pt. 802 (2011) 13
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Section 806.304 44
Pt. 808 (2011) 23, 48, 49, 48a
Section 808.002(a) 17, 31, 48, 48a
Section 808.402 ..... 13, 50a
Section 808.405-2 ..... 17, 18, 47, 51a
Pt. 808 (2014):
Section 808.002(a)(3) 10
Pt. 810 (2011):
Section 810.002 40
Pt. 813 (2011):
Section 813.106 17
Pt. 815 (2011):
Section 815.304 18
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Regulations—Continued: Page

Pt. 819 (2011) 23, 48, 49, 51a
Subpt. 819.70 ..... 48, 52a
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Section 819.7005(a) 17, 24, 45, 48, 55a
Section 819.7006 ..... 17, 47, 49, 56a
Section 819.7006(a) 17, 24, 45, 48, 56a
Section 819.7007 ..... 17, 47, 49, 57a
Section 819.7007(a)(2) 43, 57a
Section 819.7007(a)(3)-(4) 43, 57a
Section 819.7008 ..... 17, 47, 49, 58a
Section 819.7008(a)(2) 43, 58a
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p. 42,129 7

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In the Supreme Court of the United States

No. 14-916

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (Pet. App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2014. A petition for rehearing was denied on September 10, 2014 (Pet. App. 73a-74a). On November 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 8, 2015. On December 29, 2014, the Chief Justice further extended the time to January 29, 2015, and the petition was filed on that date. The petition was granted on June 22, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 Veterans Act), Pub. L. No. 109-461, 120 Stat. 3403, and other statutes and regulations are set forth in the appendix to this brief. App., *infra*, 1a-59a.

STATEMENT

A. Government Procurement Background

Federal procurement is comprehensively regulated by myriad statutes and thousands of pages of regulations, which give agencies many ways to procure supplies and services from different sources. As a general rule, a civilian agency "shall" (1) "obtain full and open competition through the use of competitive procedures" in accordance with federal statutes and the Federal Acquisition Regulation (FAR); and (2) "use the competitive procedure[s] * * * best suited under the circumstances of the procurement." 41 U.S.C. 3301(a).[1] The FAR is a "single Government-wide procurement regulation." 41 U.S.C. 1303(a)(1). Agencies "shall" follow the FAR in procurement. 41 U.S.C. 1121(c)(1).

1. Agencies can procure by soliciting and awarding new contracts on the open market. Such new contracts are generally awarded on a competitive basis through sealed bidding, by negotiation, or via simplified acquisition procedures. 41 U.S.C. 3301(b)(1), 3305(a). When contracting by negotiation or through sealed bidding, a contracting officer generally must

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[1] Different statutes apply to the Department of Defense, the Department of Homeland Security, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C. 2302(1), 2304.

give pre-solicitation public notice by posting a synopsis of the opportunity on a website, ordinarily 15 days in advance, 48 C.F.R. 5.101(a)(1), 5.201(b)(1), 5.203(a);[2] prepare a solicitation with detailed terms and conditions, see 48 C.F.R. 14.201-1, 15.204; publicly solicit bids or quotes while giving potential offerors reasonable time to respond, ordinarily at least 30 days, 48 C.F.R. 5.203(b) and (c); formally evaluate each offer according to stated criteria, 41 U.S.C. 3306(c), 3701(a); and negotiate, as appropriate, before awarding the contract to the responsible source that offers the best value to the government, 41 U.S.C. 3702, 3703(c).

"Simplified acquisition procedures" can be used for contracts in amounts not greater than the simplified acquisition threshold (currently $150,000), or for acquisitions of commercial items not greater than $6.5 million. 48 C.F.R. 2.101, 13.000; see 41 U.S.C. 134, 1901(a); see also 41 U.S.C. 1908 (inflation adjustment). Those procedures are flexible and evaluation is less formal. See 48 C.F.R. 13.003(a), 13.106-2(b)(1). But they still generally require the agency to publicly post a synopsis of the opportunity in advance, 48 C.F.R. 13.105(a); determine applicable terms and conditions, see 48 C.F.R. 13.302-1, 13.302-5; request quotes with reasonable time to respond, 48 C.F.R. 13.003(h)(2); and determine that the price is fair and reasonable, 48 C.F.R. 13.106-3(a). Simplified acquisition procedures, sealed bidding, and negotiated contracting are regulated in FAR Parts 13, 14, and 15, respectively.

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[2] The FAR and the Department of Veterans Affairs Acquisition Regulations (VAAR) are codified in Title 48 of the Code of Federal Regulations. Unless otherwise noted, all FAR and VAAR cites in this brief are to the 2011 edition that was current at the time of the procurement at issue here.

2. Agencies can also procure "from or through Government supply sources." 48 C.F.R. 8.000. Many such sources are potentially available. *Inter alia*, agencies "shall," to the extent practicable, acquire supplies from their own or other agencies' inventories. 40 U.S.C. 524(b). Agencies may procure via contracts with other agencies. See 31 U.S.C. 1535(a). Agencies may enter into indefinite-delivery contracts and then procure over the course of time by placing orders under those pre-existing contracts. See 41 U.S.C. 4101, 4103(a), 4106. Contracts under which multiple agencies (in some instances, every agency) can place orders are known as "multi-agency contracts" or "[g]overnmentwide acquisition contracts." 48 C.F.R. 8.004(a)(1) (2014).

Agencies "shall" purchase certain items or services via the Committee for Purchase From People Who Are Blind or Severely Disabled, also known as the AbilityOne program. 41 U.S.C. 8504(a); see 41 U.S.C. 8502, 8503. Agencies "shall" purchase certain products from Federal Prison Industries, Inc. 18 U.S.C. 4124(a); see 18 U.S.C. 4121. And federal law imposes specific rules for the acquisition of a variety of goods and services. For example, "[a]ll printing" services "shall be done" at the Government Printing Office (GPO). 44 U.S.C. 501.

The Federal Supply Schedule (FSS) program, also known as the Multiple Award Schedule program, is the "premier" government supply program, with tens of billions of dollars spent via the FSS each year. Gen. Servs. Admin., *For Vendors – Getting on Schedule* (June 1, 2015), http://www.gsa.gov/portal/content/198473 (*GSA Vendor FAQ*); see 48 C.F.R. 8.402(a). The FSS provides federal agencies

with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying." 48 C.F.R. 8.402(a); see 48 C.F.R. 38.101(a). The General Services Administration (GSA) or an agency with delegated authority solicits and awards indefinite-delivery contracts to vendors that agree to sell "at stated prices for given periods of time, for delivery within a stated geographic area." 48 C.F.R. 38.101(a); see 48 C.F.R. 38.101(d). GSA seeks the vendor's best price (*i.e.*, the best price given to its most favored customer), and vendors must reduce prices further under certain circumstances. See 48 C.F.R. 538.270(a), 552.238-75. "For any given item, GSA awards *multiple* contracts, hence the term 'Multiple Award Schedule.'" John W. Chierichella & Jonathan S. Aronie, *Multiple Award Schedule Contracting* 41 (2002) (*FSS Contracting*).

"These contract types were intended to reduce the administrative costs of contracting by reducing both the number of businesses and the types of terms and conditions which had to be completed for each task or delivery order." S. Rep. No. 343, 111th Cong., 2d Sess. 7 (2010) (2010 Senate Report). "Under such contracts, the government negotiates an up-front agreement on future price discounts and delivery terms, but no actual work is performed or paid for until task and delivery orders are issued." *Ibid.* Any agency can then place orders under pre-existing FSS schedule contracts, without going through the potentially cumbersome process of soliciting and awarding a new contract on the open market. See 48 C.F.R. 8.404(a). FSS ordering is thus particularly useful for relatively small-dollar or repetitive procurements.

GSA administers dozens of schedules, ranging from filing cabinets (Schedule 71, category 711-3) to software licenses (Schedule 70, categories 132-32 and 132-33). See GSA, *eLibrary*, http://gsaelibrary.gsa.gov/ElibMain/home.do (last visited Sept. 28, 2015). Agencies search for supplies or services on the GSA Advantage! website or request quotes on the GSA e-Buy website. 48 C.F.R. 8.402(c) and (d). A contracting officer should generally review offers or quotations from three or more FSS vendors. See 48 C.F.R. 8.405-1(c)(1) and (d)(3)(ii), 8.405-2(c)(2)(ii) and (3)(iii)(B). In placing an order, the contracting officer determines that the selected offer or quotation offers the "best value * * * and results in the lowest overall cost alternative to meet the Government's needs." 48 C.F.R. 8.404(d); see 48 C.F.R. 2.101 (defining best value). For orders over $500,000, a contracting officer must also make an independent determination, considering the "administrative cost savings from using an already existing contract" and other factors, that the FSS is the "best procurement approach." 48 C.F.R. 17.500(b), 17.502-1(a)(2)(ii)(A).

Congress established the FSS's predecessor in 1910, under the direction of a "general supply committee." Act of June 17, 1910 (1910 Act), ch. 297, § 4, 36 Stat. 531; see *FSS Contracting* 56. The committee was later renamed the Bureau of Federal Supply, which issued regulations governing the program. See 13 Fed. Reg. 8762 (Dec. 30, 1948) (to be codified at 41 C.F.R. 2.7, 3.1). In 1949, Congress created the GSA, transferred the Bureau's functions to it, and repealed the 1910 Act. Federal Property and Administrative Services Act of 1949, ch. 288, §§ 101(a), 102(a), 502(a)(29), 63 Stat. 379, 380, 401. Congress directed

that the GSA "shall prescribe policies and methods" for procurement and supply for executive agencies; "shall procure and supply personal property and non-personal services" for agencies; and "shall prescribe" regulations regarding procurement as necessary. 40 U.S.C. 501(b)(1)(A) and (2)(A). GSA's initial regulations implemented the FSS program. See 15 Fed. Reg. 1346 (Mar. 14, 1950) (redesignating and renumbering the Bureau of Federal Supply's regulations); 44 C.F.R. 52.7, 53.1 (Supp. 1957).

Since the FAR's inception, FSS orders have been regulated by Part 8. See 48 Fed. Reg. 42,129, 42,134-42,138 (Sept. 19, 1983) (original FAR). Congress subsequently provided that FSS orders satisfy the overarching statutory requirements that procuring agencies use "competitive procedures," so long as "participation in the program has been open to all responsible sources" and "orders and contracts under [the FSS] result in the lowest overall cost alternative to meet the needs of the Federal Government." 41 U.S.C. 152(3); see 41 U.S.C. 3302 (further competition requirements for FSS orders).

3. Congress has created a series of preferences for small businesses when an agency is soliciting and awarding contracts on the open market. The path-marking law is the Small Business Act of 1953, ch. 282, Tit. II, 67 Stat. 232, as amended, 15 U.S.C. 631 *et seq.* The Small Business Act requires the President (and each agency) to set government-wide (and agency-wide) goals for contracting with small businesses. 15 U.S.C. 644(g)(1)(A) and (2)(A). The minimum government-wide goal for all small-business contracting is 23%. 15 U.S.C. 644(g)(1)(A)(i). Agency goals must represent the "maximum practicable oppor-

tunity" for small-business concerns. 15 U.S.C. 644(g)(1)(B). Section 15 of the Small Business Act provides that small-business concerns "shall receive any award or contract or any part thereof" when, *inter alia*, the Small Business Administration and the procuring agency find that it would "be in the interest of assuring that a fair proportion of the total [government] purchases and contracts * * * in each industry category are placed with small-business concerns." 15 U.S.C. 644(a).

FAR Part 19 regulates small-business contracting preferences. The "Rule of Two" is the primary test for considering whether to restrict competition to small businesses in soliciting and awarding a particular new contract. When that Rule applies, the contracting officer "shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that": (1) "Offers will be obtained from at least two responsible small business concerns"; and (2) "Award will be made at fair market prices." 48 C.F.R. 19.502-2(b). "Each contract" between $3000 and $150,000 also "shall be reserved exclusively for small-business concerns," unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive in terms of price, quality, and delivery. 15 U.S.C. 644(j)(1); see 41 U.S.C. 1908 (inflation adjustment); 48 C.F.R. 19.502-2(a).

Set-asides are conducted via the procedures for awarding a new contract on the open market: through simplified acquisition procedures, sealed bidding, or contracting by negotiation. 48 C.F.R. 19.502-4(a); see 7 John Cosgrove McBride, *Government Contracts* § 48.140[1] (2012). Part 19 exempts from set-aside

requirements all awards below $3000 and "purchases from required sources of supply under Part 8 (*e.g.*, * * * [FSS] contracts)." 48 C.F.R. 19.502-1(b); see 15 U.S.C. 644(j).

Congress has also enacted a series of socioeconomic contracting preferences modeled on Section 15 of the Small Business Act and on the FAR's "Rule of Two." Congress has created preferences for awarding contracts to small businesses owned by socially and economically disadvantaged individuals, 15 U.S.C. 637(a); small businesses owned by women, 15 U.S.C. 637(m); small businesses in historically underutilized business zones (HUBZone businesses), 15 U.S.C. 657a; and small businesses owned and controlled by veterans with service-connected disabilities (SDVOSBs), 15 U.S.C. 657f. Each of these programs has annual goals, and each agency's goal must represent its "maximum practicable opportunity." 15 U.S.C. 644(g)(1)(A)(ii)-(v) and (B).

Contracting officers have discretion whether to apply these socioeconomic programs when awarding a new contract on the open market. 48 C.F.R. 6.204-6.207. There is no order of precedence among the socioeconomic programs. 48 C.F.R. 19.203(a).

4. Congress has not enacted an overarching statute indicating the order of priority among the many different procurement sources and authorities. For 36 years, regulations (and the FAR since its inception) have filled that gap. See 48 C.F.R. 8.002, 8.003; 44 Fed. Reg. 47,934-47,935 (Aug. 16, 1979); see also 48 C.F.R. 8.001(a) (1984). The regulations provide that, except when a specific-source rule (such as the requirement that the GPO be used for printing) applies, or as otherwise provided by law, agencies "shall"

follow a stated order of priority. 48 C.F.R. 8.002(a), 8.003. At all times relevant to the disposition of this case, the order of priority for supplies was (1) agency inventories; (2) excess from other agencies; (3) from Federal Prison Industries; (4) via the AbilityOne program; (5) via wholesale supply sources, such as GSA stock programs; (6) via mandatory-use FSS schedules; (7) via optional-use FSS schedules; and (8) from commercial sources on the open market. 48 C.F.R. 8.002(a)(1). For services, the order was (1) via the AbilityOne program; (2) via mandatory-use FSS schedules; (3) via optional-use FSS schedules; and (4) from commercial sources on the open market or via Federal Prison Industries. 48 C.F.R. 8.002(a)(2). Procurement under the FSS program accordingly had priority over awarding new contracts to commercial sources on the open market.[3]

When GSA awards a new FSS schedule contract, it follows the procedural requirements for soliciting and awarding new contracts on the open market. See 48 C.F.R. 38.101(e) ("The requirements of [FAR Parts] 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation."). Once GSA has awarded a schedule contract, however, those same procedures are not repeated each time an agency places an order under the pre-existing FSS contract.

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[3] For years, virtually all FSS schedules have been optional. See *FSS Contracting* 48, 54 n.37. After the procurement here, the government-wide list in FAR Part 8 was revised and "mandatory use" schedules were deleted. See 78 Fed. Reg. 80,378 (Dec. 31, 2013). Agencies still can place FSS orders without awarding a new contract on the open market. *Ibid.*; see *id.* at 80,377 ("Agencies are encouraged to consider existing vehicles prior to awarding new contracts."). Some Department of Veterans Affairs FSS schedules remain mandatory. See 48 C.F.R. 808.002(a)(3) (2014).

In particular, agencies have long been able to place FSS orders without applying small-business contracting preferences. Under the order of priority FAR Part 8 establishes (see pp. 9-10, *supra*), procurement from or through government sources—including optional-use and mandatory-use FSS schedules—takes precedence over awarding new contracts to commercial sources on the open market, and contracting officers who place FSS orders therefore turn to Part 8's procedures governing that process. See 48 C.F.R. 8.002(a).

The FAR provisions governing the FSS program state that, subject only to exceptions that are inapplicable here, FAR Parts 13, 14, 15, and 19—*i.e.*, the procedures for soliciting and awarding new contracts on the open market, including small-business contracting preferences—"do not apply to * * * orders placed against [FSS] contracts." 48 C.F.R. 8.404(a). When "placing orders under [FSS] contracts," contracting officers "shall not seek competition outside of the [FSS] or synopsize the requirement" and need not "make a separate determination of fair and reasonable pricing." 48 C.F.R. 8.404(a) and (d); see 48 C.F.R. 8.405-5(a) ("the mandatory preference programs of Part 19 do not apply [to] orders placed against schedule contracts"). Part 19 exempts "purchases from required sources of supply under Part 8" from set-aside requirements, and gives "[FSS] contracts" as an example of such a source. 48 C.F.R. 19.502-1(b). FAR Part 8 is titled "required sources of supplies and services," and it includes procedures for ordering from mandatory-use and optional-use FSS schedules. 48 C.F.R. Pt. 8 (capitalization omitted); see 48 C.F.R. 8.405. And Part 38, which regulates awards of new

schedule contracts, provides that "[t]he requirements of parts 5, 6, and 19" generally "do not apply to orders * * * placed under [FSS] schedule contracts," with exceptions that are inapplicable here. 48 C.F.R. 38.101(e). Agencies thus can place FSS orders without applying small-business contracting preferences.

When placing FSS orders, agencies "should consider" at least one small business in the socioeconomic categories described above if such a vendor has previously been awarded an FSS contract under the relevant schedule. 48 C.F.R. 8.405-5(b). Agencies also "should give preference" to ordering from small businesses "when two or more items at the same delivered price will satisfy the requirement." 48 C.F.R. 8.405-5(c).

In 2010, Congress required the promulgation of federal regulations to permit the GSA to set aside FSS schedule contracts and to "establish guidance under which Federal agencies may, at their discretion * * * set aside orders placed against [FSS] contracts for small business concerns." Small Business Jobs Act of 2010 (2010 Jobs Act), Pub. L. No. 111-240, § 1331, 124 Stat. 2541 (15 U.S.C. 644(r)). FAR Part 8 now provides that, "[a]lthough the preference programs of part 19 are not mandatory" when using the FSS, contracting officers "may" "[s]et aside [FSS] orders" for small-business concerns. 48 C.F.R. 8.405-5(a) (2014); see 48 C.F.R. 19.502-4(c) (2014) (indicating that discretionary FSS set-asides are the only set-aside mechanism for "orders placed under the [FSS] Program"). GSA reports that, in fiscal year 2012, approximately 80% of FSS contractors were small businesses, and 36% of FSS spending went to small businesses. See *GSA Vendor FAQ*.

B. The Department Of Veterans Affairs

The mission of the Department of Veterans Affairs (VA) is to provide benefits and care to our Nation's veterans, their families, and their survivors. 38 U.S.C. 301(b). The VA runs the largest integrated health care system in the Nation, providing care to more than 8 million veterans annually. Veterans Health Admin., *About VHA*, http://www.va.gov/health/aboutVHA.asp (last visited Sept. 28, 2015). The VA reported that, in fiscal year 2012, it purchased $17.52 billion worth of medical equipment and other supplies and services. *Small Business Goaling Report, Fiscal Year 2012*, at 1 (Mar. 19, 2013), https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2012.pdf (*2012 Goaling Report*).

The VA issues regulations, known as the VA Acquisition Regulation (VAAR), that implement and supplement the FAR. 48 C.F.R. 801.000, 801.101(b); see 48 C.F.R. 1.101 ("The Federal Acquisition Regulations System consists of the [FAR], which is the primary document, and agency acquisition regulations that implement or supplement the FAR."). VAAR part numbers start at 801 and correspond to the FAR parts they build upon. See 48 C.F.R. 1.303(a) (establishing numbering scheme). Thus, Part 801 builds upon Part 1, Part 802 builds upon Part 2, and so on.

GSA has delegated to the VA authority to administer FSS schedules. See 48 C.F.R. 8.401, 808.402. The VA has nine FSS schedules, including for medical and surgical equipment and supplies, pharmaceuticals, professional health care and staffing services, and laboratory testing and analysis services. Office of Acquisition & Logistics, *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last

visited Sept. 28, 2015). The VA encourages veteran-owned small businesses to participate in the FSS program. J.A. 9.

"[I]n 2011, the VA used FSS contracts for 20% of its total [procurement] spending, and 13% of these FSS expenditures went" to veteran-owned small businesses. Pet. App. 4a. The VA stated in 2009 that, by number of transactions, it "purchases approximately 60 percent of its goods and services through the FSS." 74 Fed. Reg. 64,624 (Dec. 8, 2009). The VA reported that, in fiscal year 2009, it entered into approximately 230,000 total transactions. *Small Business Goaling Report, Fiscal Year 2009*, at 1, https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2009.pdf (last visited Sept. 28, 2015) (*2009 Goaling Report*).

C. The 2006 Veterans Act And The VA's Regulations

1. The 2006 Veterans Act created a targeted program specifically for the VA to contract with veteran-owned small businesses. See 38 U.S.C. 8127, 8128. Congress enacted this program in response to the government's failure, notwithstanding the government-wide contracting preference in 15 U.S.C. 657f, to meet its goals for contracting with SDVOSBs. See H.R. Rep. No. 592, 109th Cong., 2d Sess. 15-16 (2006).

Section 8127 of Title 38 is modeled on prior small-business contracting-preference statutes, and it incorporates the Rule of Two. Subsection (a) requires the VA Secretary to set annual goals for contracting with small businesses owned and controlled by any veteran (VOSBs), as well as goals for SDVOSBs specifically. 38 U.S.C. 8127(a)(1). The Secretary's goal for SDVOSBs must meet or exceed the current government-wide goal, which itself must meet or

exceed three percent. 38 U.S.C. 8127(a)(3); see 15 U.S.C. 644(g)(1)(A)(ii). No other agency has a goal (or contracting preferences) for VOSBs.

Subsections (b), (c), and (d) of Section 8127 establish contracting preferences for "purposes of meeting the goals under subsection (a)." 38 U.S.C. 8127(b), (c), and (d). Subsection (d) incorporates the Rule of Two and states:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer * * * shall award contracts on the basis of competition restricted to [VOSBs or SDVOSBs] if the contracting officer has a reasonable expectation that two or more [VOSBs or SDVOSBs] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. 8127(d).

Subsections (b) and (c) allow the VA to award sole-source contracts below certain dollar thresholds. A VA contracting officer "may" use "other than competitive procedures" (*e.g.*, sole-source awards) to "enter[] into a contract" with a VOSB or SDVOSB if the amount is less than the simplified acquisition threshold ($150,000). 38 U.S.C. 8127(b). A contracting officer also "may award a contract" on a sole-source basis to a VOSB or SDVOSB, provided that the anticipated price will be between $150,000 and $5 million and the officer determines that the recipient is a "responsible source" and that "the contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(c).

Subsection (e) provides that "[a] small business concern may be awarded a contract under this section" only if it is listed in a VA database. 38 U.S.C. 8127(e). Subsections (f), (g), and (h) require the VA to verify that a business is, in fact, a VOSB or SDVOSB before listing it in the database; impose penalties for misrepresentations; and address the treatment of a business after the death of a veteran owner. 38 U.S.C. 8127(f)-(h). As of September 28, 2015, the database listed 7332 verified VOSBs, including 5544 SDVOSBs. VA, *Vendor Information Pages*, http://www.vip.vetbiz.gov/ (last visited Sept. 28, 2015).

Subsection (i) directs that "[p]references for awarding contracts to small business concerns shall be applied in the following order of priority": (1) contracts awarded under Section 8127 to SDVOSBs; (2) contracts awarded under Section 8127 to VOSBs; (3) contracts awarded under the preferences for HUBZone businesses or for small businesses owned by socially and economically disadvantaged individuals; and (4) "[c]ontracts awarded pursuant to any other small business contracting preference." 38 U.S.C. 8127(i). If after December 31, 2008, the VA contracts with another agency to acquire goods or services, that agency must agree to comply with Section 8127 "to the maximum extent feasible." 38 U.S.C. 8127(j). And when the VA is procuring "pursuant to [another] contracting preference," the VA "shall give priority" to any VOSB or SDVOSB "if [it] also meets the requirements of that contracting preference." 38 U.S.C. 8128(a).

2. VA regulations implement Section 8127(d). They provide:

> The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for VOSBs). Sections 813.106, 819.7007, and 819.7008 address optional sole-source procedures. See 48 C.F.R. 813.106, 819.7007, 819.7008.

The VA's regulations do not depart from the FAR's government-wide rule that procurement from or through government sources (including the FSS) has priority over soliciting and awarding a new contract on the open market. Compare 48 C.F.R. 808.002(a), with 48 C.F.R. 8.002(a). The VA's regulations also do not depart from the FAR's rule that orders placed under pre-existing FSS contracts are exempt from Part 19's small-business contracting requirements. Compare 48 C.F.R. 808.405-2, 819.7005, 819.7006, with 48 C.F.R. 8.404(a), 8.405-2, 8.405-5(a), 19.502-1(b). In promulgating its regulations, the VA explained that "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule." 74 Fed. Reg. at 64,624; see *ibid.* ("[P]art 8 procedures

in the FAR will continue to apply to VA FSS task/delivery orders."); *ibid.* ("[S]et-asides do not apply to FAR part 8 FSS acquisitions.").

The VA's regulations instead provide an additional substantive preference for VOSBs when the agency places FSS orders. When the VA places an FSS order with a statement of work and evaluation factors other than price, the contracting officer "shall" provide additional consideration to VOSBs and businesses that will subcontract with VOSBs. 48 C.F.R. 808.405-2, 815.304, 815.304-70. That requirement, however, addresses the contracting officer's choice among FSS vendors; it does not address the decision whether to utilize the FSS for a particular procurement.

D. Facts And Procedural History

In early 2012, the VA decided to procure an Emergency Notification Service (ENS) for four VA medical centers and associated outpatient clinics. J.A. 30. An ENS "rapidly deliver[s] messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster." *Ibid.* The VA sought ENS services until implementation of a new VA-wide ENS system, which was expected to begin later in 2012. *Ibid.* The contracting officer decided to use an optional-use FSS schedule, and awarded a task order to a business that was not a VOSB. J.A. 30-31. The task order was for $33,824.10 for one year, with options to extend it for two more years. J.A. 31. The maximum contract amount, including options, was $101,472.30. *Ibid.*

Petitioner is a verified SDVOSB. J.A. 33. On March 14, 2012, petitioner filed a bid protest with the Government Accountability Office (GAO). J.A. 31; see 31 U.S.C. 3552(a). Petitioner alleged that the VA had

violated Section 8127 by using the FSS without first determining whether two or more VOSBs could perform the contract at a fair and reasonable price and, if so, soliciting and awarding a contract on the basis of competition restricted to VOSBs. Pet. App. 10a. Relying on its prior decision in *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), the GAO sustained the protest and rejected the VA's argument that it "need not consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program." J.A. 17, 19. As in *Aldevra*, the VA advised petitioner that it would not follow the GAO's non-binding recommendation. J.A. 11-12, 32; see *Honeywell, Inc.* v. *United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989).

Petitioner filed a bid protest complaint in the United States Court of Federal Claims (CFC), see 28 U.S.C. 1491(b)(1), which granted summary judgment to the government. Pet. App. 33a-71a. The CFC stated that the question in the case was "whether Congress intended that VA retain its discretion to procure goods and services from the FSS, in light of the set-aside procedures set forth in" Section 8127. *Id.* at 34a-35a. The CFC found Section 8127 ambiguous as to whether it altered the "historic exception of the FSS from small business set-asides," *id.* at 63a, and it deferred to the VA's statement in the preamble to the final regulations that Section 8127's procedures "do[] not apply to FSS task or delivery orders," *id.* at 68a (brackets in original) (quoting 74 Fed. Reg. at 64,624).

The court of appeals affirmed. Pet. App. 1a-21a. The court explained that requiring the VA to follow Section 8127 procedures in all cases, without regard to

the Secretary's goals, would "read[] the words 'for purposes of meeting the goals under subsection (a)' out of the statute" and would "make[] the mandatory goal-setting statutory provision [in subsection (a)] unnecessary." *Id.* at 20a. The court stated that "[t]he correct reading of the statute according to its plain meaning puts the 'shall' in subsection (d) in harmonious context with the discretionary 'may' provisions of subsections (b) and (c)," and "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.* The court concluded that "[t]he mandate is, therefore, the required procedure for meeting these goals" and that the VA "need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met." *Ibid.*

Judge Reyna dissented. Pet. App. 22a-32a. He concluded that Section 8127 unambiguously requires the VA to apply Section 8127's procedures before procuring any goods or services from the FSS. *Id.* at 22a-23a.

SUMMARY OF ARGUMENT

The VA has correctly determined that 38 U.S.C. 8127 does not apply to the agency's placement of orders under pre-existing FSS contracts. At a minimum, the VA's interpretation is reasonable and warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. Section 8127 was modeled on a series of prior small-business contracting preferences. See 15 U.S.C. 637(a), 637(m), 644(a), 644(j), 657a, 657f. All of those statutes used phrases like "awarding contracts" or "offering contracts" to describe the agency decisions to which the statutes applied. See *ibid.* As petitioner

recognizes (Br. 9-10), the FAR has long reflected the understanding that those statutory small-business preferences apply when an agency solicits and awards new contracts on the open market, but not when the agency instead places orders under *pre-existing* government contracts.

Like the predecessor statutes on which it was modeled, Section 8127(d) applies by its terms only when the VA "award[s] contracts." 38 U.S.C. 8127(d). Like similar phrases in the forerunner statutes, that phrase is properly interpreted to mean that Section 8127(d) applies when the VA solicits and awards new contracts to commercial sources on the open market, but not when the VA places orders under pre-existing government contracts. Agencies spend tens of billions of dollars each year in task and delivery orders under FSS contracts, and billions more under similar contract vehicles. This method of procurement is vital to the VA's ability to provide benefits and care to veterans. The FSS program is advantageous to federal procurement officials largely because the procedures that apply when awarding a new contract on the open market need be completed only once, when the schedule contract is awarded, and need not be replicated each time a new order is placed.

Petitioner's expansive interpretation of Section 8127(d) would mark a radical departure from past practice and could seriously impede the VA's efforts to provide high-quality care to veterans. Under petitioner's interpretation, the VA could not use long-standing systems and procedures to swiftly purchase prescription drugs, medical or surgical supplies, laboratory services, or mundane items like griddles or food slicers. Rather, the agency would first be re-

quired to perform market research to determine whether the Rule of Two is satisfied. And if the Rule of Two were satisfied, the VA would be required to follow the procedures for soliciting and awarding a wholly new contract in every instance, even when a pre-existing government contract fulfills the same need. That approach would create waste and add red tape and delay to the VA's efforts to provide benefits and services to veterans. And it would provide only limited and uncertain advantages to VOSBs, who already earn a significant share of VA dollars spent under the FSS.

B. At a minimum, the VA's interpretation of Section 8127(d) is reasonable and warrants *Chevron* deference. Nothing in Section 8127(d)'s text suggests, let alone unambiguously establishes, that Congress intended to depart from the understanding that small-business preferences apply to the award of new government contracts, not to the placement of orders under pre-existing government contracts. The VA acted reasonably in construing Section 8127 in a manner consistent with a long string of prior laws, and in rejecting an alternative construction that would entail both a sharp break with past practice and serious practical disruption.

Petitioner contends that, because the VA's regulations implementing Section 8127(d) do not refer to the SDVOSB and VOSB contracting goals that the Secretary is required to establish, those regulations require the agency to apply Section 8127's contracting preference in *all* procurements, including orders placed under pre-existing FSS contracts. That is incorrect. The VA's regulations require agency contracting officers to apply Section 8127 procedures whenever they

solicit and award new contracts to commercial sources on the open market, even if the VA is achieving the Secretary's goals for the relevant year. The VA thereby maximized the opportunities available to VOSBs in that important context. But the VA did not take the further step of requiring its contracting officers to apply these same procedures before placing orders under pre-existing FSS contracts. Regulations in the FAR carry meaning not only through what they say, but also by where they say it. See 48 C.F.R. 1.303(a). By codifying its regulations in Parts 808 and 819 of the FAR, the VA plugged those regulations into FAR Parts 8 and 19, which establish the government-wide rule that agencies may place FSS orders without applying small-business contracting preferences.

ARGUMENT

THE VA CAN PLACE ORDERS UNDER PRE-EXISTING FSS CONTRACTS WITHOUT APPLYING SECTION 8127'S PREFERENCE FOR AWARDING NEW CONTRACTS

A. Section 8127 Does Not Override The VA's Ability To Place FSS Orders Without Applying Small-Business Contracting Preferences

The task of interpreting Section 8127 begins "with the language of the statute," *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), construed "in accord with its ordinary or natural meaning," *Smith* v. *United States*, 508 U.S. 223, 228 (1993). "[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Accordingly, this Court "must read the words 'in their context and

with a view to their place in the overall statutory scheme.'" *Ibid.* (citation omitted); see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions.") (citation and internal quotation marks omitted).

1. Section 8127(d) imposes a mandate

Subsection (d) of Section 8127 states that, "[e]xcept as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section," a VA contracting officer "*shall* award contracts on the basis of competition restricted to" VOSBs if the Rule of Two is satisfied. 38 U.S.C. 8127(d) (emphasis added). Subsections (b) and (c), by contrast, establish discretionary procedures ("*may* use" and "*may* award") for awarding sole-source contracts below specified dollar thresholds. 38 U.S.C. 8127(b) and (c) (emphases added). The contrast with that permissive language confirms the natural inference that the word "shall" in subsection (d) is mandatory.

The disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies. On its face, Section 8127(i) requires the VA to give the Section 8127(d) contracting preference priority over any other small-business contracting preference. 38 U.S.C. 8127(i)(1) and (2). Section 8127(i) thus eliminates the discretion to choose among socioeconomic contracting preferences that the VA had previously possessed. Cf. 48 C.F.R. 19.203(a)-(c). The range of options available to VA contracting officers also does not depend on whether the agency is achieving its SDVOSB and VOSB contracting goals for the relevant year. See 48 C.F.R. 819.7005(a), 819.7006(a). Rather,

VA contracting officers must apply Section 8127's contracting preference whenever they solicit and award new contracts on the open market—*i.e.*, through simplified acquisition procedures, sealed bidding, or contracting by negotiation—even if it is clear that the Secretary's goals for a particular year will be achieved.[4] See *ibid.* And if the Rule of Two is satisfied, the VA must award the contract either on the basis of restricted competition or on a sole-source basis (if subsection (b) or (c) is satisfied as well). See 38 U.S.C. 8127(d).

In the procurement at issue here, however, the VA did not solicit and award a new contract on the open market. Rather, the agency placed an order under a *pre-existing* FSS contract. The only question in this case is whether the VA may place orders under pre-existing FSS contracts without first applying Section 8127's procedures for "award[ing] contracts." 38 U.S.C. 8127(d). For the reasons set forth below, the answer is yes.

2. Section 8127(d)'s text and context show that it does not apply when the VA places orders under pre-existing FSS government contracts

a. As petitioner recognizes (Br. 8-12), Congress modeled Section 8127 on a string of prior small-business contracting statutes. See 15 U.S.C. 637(a), 637(m), 644(a) 644(j), 657a, 657f. The natural inference is that, except to the extent that Section 8127 clearly indicates a contrary intent, Congress intended

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[4] The goals established by the Secretary pursuant to Section 8127(a) are not ceilings. The VA has certified that it exceeded its contracting goals in every year since the 2006 Veterans Act went into effect. Pet. App. 19a.

it to operate in the same way as the statutes on which it was modeled. Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (brackets in original) (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986)); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate" those interpretations).

In each of the predecessor statutes on which Section 8127 was modeled, Congress used a phrase like "award contracts" to describe when the preference applied. See 15 U.S.C. 637(a)(1)(D) ("contract opportunity offered for award"); 15 U.S.C. 637(m)(2) ("any contract"); 15 U.S.C. 644(j)(1) ("[e]ach contract * * * reserved"); 15 U.S.C. 657f(a) ("award a * * * contract"); 15 U.S.C. 657f(b) ("award contracts"); 15 U.S.C. 657a(b)(2)(A) (2006) ("award * * * contracts"); 15 U.S.C. 657a(b)(2)(B) (2006) ("contract opportunity * * * awarded"). In 2006, when Congress enacted Section 8127, the FAR had long treated those preferences as applicable when agencies solicited and awarded new contracts on the open market, *i.e.*, when an agency awarded a new contract via simplified acquisition procedures, sealed bidding, or contracting by negotiation. See, *e.g.*, 48 C.F.R. 19.502-4(a) (2006); 48 C.F.R. 19.502-4(a) (1986).

As petitioner recognizes (Br. 9-10), however, the FAR had also long reflected the understanding that those preferences do *not* apply when agencies place orders under pre-existing FSS government contracts (or when agencies procure goods from other government sources). See 48 C.F.R. 8.002(a), 8.404(a); 48 C.F.R. 8.001(a), 8.404(a) (1986); see also pp. 10-12, *supra* (detailing regulations); Pet. App. 38a. To be sure, a new procurement under a pre-existing agreement creates further contractual obligations. See *Lanier Bus. Prods.*, B-187969, 77-1 CPD ¶ 336, at 4 (Comp. Gen. May 11, 1977). A contracting officer's issuance of a task order under a pre-existing FSS contract therefore could reasonably be described for other purposes as the formation of a "contract." Cf. J.A. 31. The statutory and regulatory backdrop against which Section 8127(d) was enacted, however, strongly suggests that Congress used the term "award contracts" in a more limited sense here.

The term of art for procurement under the FSS and other indefinite-delivery vehicles is that the agency places "orders" under a pre-existing government "contract." See, *e.g.*, Pet. Br. 9, 10, 17, 18, 48, 49; see also 48 C.F.R. 2.101 ("*Delivery order* means an order for supplies placed against an established contract or with Government sources."); *ibid.* ("*Task order*" has same meaning for services); 48 C.F.R. 8.401 ("place orders * * * against [FSS] contracts."); 48 C.F.R. 8.404(a) and (b)(1) ("orders placed against [FSS] contracts"; "placing orders under [FSS] contracts"; "when placing an order"); 48 C.F.R. 8.404(c), (d), and (e) ("[o]rders placed under a[n] [FSS] contract"; "placing an order against a schedule contract"; "issuance of an order * * * against a schedule contract");

48 C.F.R. 8.405-5(b) (2014) ("[o]rders placed against schedule contracts"); 48 C.F.R 38.101(c) and (e) ("may issue orders under the schedules"; "orders * * * placed under resulting schedule contracts").[5] Congress has also consistently used words like "orders" when referring to agency purchases under pre-existing FSS contracts or other indefinite-delivery vehicles. See, *e.g.*, 41 U.S.C. 3302 (competition requirements for "task order[s]" or "delivery order[s]" under multiple award contracts); 41 U.S.C. 4101 (defining task and delivery order contracts as contracts that "provide[] for the issuance of orders"); 41 U.S.C. 4104(c)(2) ("ordering and program practices" under indefinite-delivery contracts); 41 U.S.C. 4106(b) (procedures for "issuance of a task or delivery order under a task or delivery order contract").

The statutory language that Congress used in 2010, when it first empowered agencies to set aside FSS procurements for small businesses, is particularly striking. Congress directed that regulations be promulgated to "establish guidance under which Federal agencies may, at their discretion * * * set aside orders placed against multiple award contracts for small business concerns." 15 U.S.C. 644(r)(2). That provision uses the term "contracts" to describe the overall FSS schedule agreements, and the term "orders" to

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[5] See also *Bridges Sys. Integration, LLC*, B-411020, 2015 CPD ¶ 144, at 5-6 (Comp. Gen. Apr. 23, 2015) ("The issuance of task orders under the FSS contract is not the same thing as awarding the FSS contract under which orders are issued."); *Black's Law Dictionary* 398 (10th ed. 2014) ("When exercising its contractual rights, the government issues task orders to specify the product or service requirements, which may vary with each order."); *FSS Contracting* 41 ("Once GSA issues a[n] [FSS] contract, the buying agencies order directly from the vendor.").

describe individual procurements under pre-existing FSS contracts. And unlike 15 U.S.C. 644(j), which *requires* the use of small-business set-asides for contracts within a particular dollar range (see pp. 34-36, *infra*), Section 644(r) does not mandate set-asides for any class of "orders placed against multiple award contracts." Rather, all FSS set-asides are discretionary. See 15 U.S.C. 644(r) ("may, at their discretion").

The distinction between the initial award of an FSS contract and the subsequent placement of orders under that contract is central to the FSS program. Set-asides and other procedures for soliciting and awarding new contracts—including detailed regulations in Parts 5, 6, 13, 14, 15, and 19 of the FAR—apply when the GSA or another agency awards new FSS schedule contracts. See 48 C.F.R. 8.404(a), 38.101(e). But "[w]hen placing an order under a schedule contract, the procuring agency is not required to seek further competition, synopsize the solicitation or award, or to determine separately fair and reasonable pricing, *since the planning, solicitation, and award phases of the FSS comply with FAR requirements.*" *Card Tech. Corp.*, B-275385, 97-1 CPD ¶ 76, at 2 (Comp. Gen. Feb. 18, 1997) (emphasis added); see 48 C.F.R. 8.404(a) (procedural requirements for new contracts generally do not apply to FSS orders); 48 C.F.R. 38.101(e) (same); see also 48 C.F.R. 16.505(a)(1) (similar for orders under other indefinite-delivery contracts). Indeed, if the requirements for awarding new contracts applied every time an agency placed an FSS order, the FSS would hardly be a "simplified process," 48 C.F.R. 8.402(a), and its *raison d'être* would be destroyed.

b. Like the predecessor statutes on which it was modeled, Section 8127 refers solely to awarding or entering into contracts. See 38 U.S.C. 8127(b) ("entering into a contract"); 38 U.S.C. 8127(c) ("award a contract"); 38 U.S.C. 8127(d) ("award contracts"); 38 U.S.C. 8127(i) ("priority for contracting preferences"; "[p]references for awarding contracts"; "[c]ontracts awarded pursuant to subsection (b), (c), or (d)"; "[c]ontracts awarded pursuant to" other small-business "contracting preference[s]").

The fact that Section 8127(d) applies by its terms when the VA "award[s] contracts," and does not refer to "orders," the FSS, or broader terms like "procurement," reinforces the inference that Congress intended for Section 8127 to operate in the same fundamental way as the prior small-business contracting preferences upon which it was modeled. Section 8127(d)'s contracting preference thus applies when the VA solicits and awards contracts on the open market through sealed bidding, negotiated contracting, or simplified acquisition procedures. It does not apply when the VA places orders under pre-existing government contracts, including the FSS contract at issue in this case.

Section 8127's placement within VA-specific procurement law reinforces the inference. In the two sections of Title 38 that immediately precede Section 8127, Congress expressly contemplated that the VA would use the FSS. Section 8125 generally prohibits the VA from entering into local contracts for items listed in certain VA FSS schedules. 38 U.S.C. 8125(a) and (e)(1). Section 8125 thus often requires the VA to use national contracts or FSS orders for those items. And Section 8126 requires certain prescription drugs

to be listed on VA FSS schedules. 38 U.S.C. 8126(a)(1). It is unlikely that, after contemplating in two consecutive sections that the VA would use the FSS, Congress would sharply restrict the VA's ability to use the FSS in the very next section—without mentioning the FSS at all.[6]

3. Section 8127's structure confirms that the VA does not "award contracts" within the meaning of Section 8127(d) when it places FSS orders

Subsection (a) of Section 8127 directs the Secretary to establish goals for contracting with SDVOSBs and VOSBs. Each of the next three subsections states that specified contracting preferences should be used for "purposes of meeting the goals under subsection (a)." 38 U.S.C. 8127(b)-(d). As the VA's regulations implement the statute, the goals are significant. With respect to any particular procurement, a VA contracting officer can make a meaningful and informed choice between placing an order under the FSS or a similar indefinite-delivery contract, on the one hand, and soliciting and awarding a wholly new contract on the open market, on the other. See 48 C.F.R. 8.002(a), 808.002(a); see also pp. 47-50, *infra*. Agencies generally have broad discretion to decide whether to use the FSS or to solicit and award a new contract on the open

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[6] Congress has considered but has not enacted amendments to Section 8127 to address the FSS. See H.R. 4048, 112th Cong., 2d Sess. 2 (2012); H.R. 2416, 111th Cong., 1st Sess. 2 (2009). Congress's refusal "to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

market. See Pet. App. 38a; see also *Tyler Constr. Grp.* v. *United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009) (agencies have "broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation"). In exercising that discretion, the contracting officer can consider, *inter alia*, the time and expense that each approach can be expected to entail; the likely impact of each alternative approach on the achievement of the Secretary's goals for VOSBs; and the likely impact on achievement of the VA's other small-business contracting goals. See 15 U.S.C. 644(g)(1)(B) (other goals); 48 C.F.R. 17.502-1(a)(2) (identifying considerations that can inform the decision whether to procure under pre-existing contracts). As the court of appeals recognized, preserving a role for discretion "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." Pet. App. 20a.

By contrast, petitioner's interpretation renders the Secretary's discretion to set goals insignificant or irrelevant. See Pet. App. 19a-20a. On petitioner's view, subsections (b), (c), or (d) must be applied across-the-board in every VA procurement. Under that approach, the specific goals established by the Secretary would have virtually no bearing on the VA's balancing of competing agency interests or on its ultimate choice, in any particular procurement, among the alternative methods described above. Whether the goals are satisfied instead would depend on marketplace conditions that have nothing to do with the Secretary's goals and are outside the VA's control. See Pet. App. 19a-20a. That understanding is inconsistent with the obvious inference that the "goals"

established by the Secretary pursuant to subsection (a) are intended to guide the agency's behavior. See *Webster's Third New International Dictionary* 972 (1993) (a "goal" is "the end toward which effort or ambition is directed: aim, purpose").

Subsection (i)'s command that the VA must consider veterans first before "other small business contracting preference[s]," 38 U.S.C. 8127(i), also weighs heavily against petitioner's view that the VA must consider veterans first "before turning to other sources of supply," Pet. Br. 26-27; see *id.* at 28-29. If subsection (d) had priority over procurement from all other sources of supply, Section 8127(i)'s narrower directive that SDVOSBs and VOSBs have priority over other small businesses would serve no evident purpose. And it would be anomalous for Congress to describe Section 8127 as a "[p]referenc[e] for awarding contracts to small business concerns," and to include it among "other small business contracting preference[s]," 38 U.S.C. 8127(i), if Section 8127 was a new species of favoritism that operated in a fundamentally different manner than any "other small business contracting preference," *ibid.*; cf. *Logan* v. *United States*, 552 U.S. 23, 31 (2007) ("Words in a list are generally known by the company they keep.").

4. The FAR's prior treatment of similarly mandatory contracting preferences confirms that the VA retains its authority to place FSS orders without applying contracting preferences for SDVOSBs and VOSBs

Petitioner contends (Br. 10, 14-15) that the 2006 Veterans Act is unique among small-business contracting preferences because Section 8127(d) uses the word "shall," whereas the other statutes "are express-

ly discretionary, not mandatory." As explained above, however, the word "shall" makes clear that subsection (d)'s Rule of Two is mandatory, but does not explain when that Rule must apply. 38 U.S.C. 8127(d). Except when the VA chooses to conduct a sole-source procurement under Section 8127(b) or (c), the agency must apply the Rule of Two whenever it "award[s] contracts." See *ibid.*; 48 C.F.R. 819.7005(a), 819.7006(a). But neither the word "shall" nor any other language requires, or even suggests, that the VA should be viewed as "award[ing] contracts" within the meaning of Section 8127(d) when it places orders under pre-existing government contracts. Rather, like the provisions on which it was modeled, Section 8127(d) applies only when the VA solicits and awards new contracts on the open market.

Petitioner also overlooks other small-business contracting-preference statutes with the word "shall." Most significantly, 15 U.S.C. 644(j) provides that "[e]ach contract" between $3000 and $150,000 "*shall* be reserved exclusively for small business concerns," unless "the contracting officer is unable to obtain" competitive offers from two or more small businesses. 15 U.S.C. 644(j)(1) (emphasis added); see 41 U.S.C. 1908 (inflation adjustment to statutory dollar range). And in 2006, when Congress enacted Section 8127, the preference for HUBZone businesses similarly provided that, "[n]otwithstanding any other provision of law * * * a contract opportunity *shall be awarded* pursuant to this section" on the basis of restricted competition if the Rule of Two is satisfied. 15 U.S.C. 657a(b)(2)(B) (2006) (emphasis added).[7]

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[7] In 2010, the CFC interpreted the phrase "[n]otwithstanding any other provision of law" to give the HUBZone program priority

As petitioner recognizes (Br. 9-10), the FAR has long reflected the understanding that the government may procure goods from or through the FSS and other government sources, without applying the small-business contracting preferences on which Section 8127 was modeled. See pp. 10-12, *supra* (collecting FAR provisions). The longstanding flexibility afforded federal agencies to place FSS orders without applying small-business contracting preferences has had great practical significance. Both Section 644(j) and the HUBZone preference apply government-wide, not merely to one agency. Section 644(j) applies to relatively small-dollar purchases, which are the FSS's heartland. And Section 644(j) has imposed the same basic "[e]ach contract * * * shall be reserved" mandate since Congress enacted it in 1978. See Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221, 92 Stat. 1771.

Agencies have thus relied on the understanding of those provisions that is reflected in the FAR to purchase billions of dollars worth of goods and services via the FSS, in countless transactions over the span of

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over other socioeconomic contracting preferences, contrary to the government's interpretation. See *DGR Assocs., Inc.* v. *United States*, 94 Fed. Cl. 189, 206 (2010); Office of Legal Counsel, *Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs*, 2009 WL 2870163, at *4-*5 (Aug. 21, 2009). Congress responded by deleting the "[n]otwithstanding" language and changing "shall" to "may," effectively overruling the CFC's decision and adopting the government's position. 2010 Jobs Act § 1347(b)(1) and (c)(1), 124 Stat. 2547. In Section 8127, Congress resolved this ambiguity for purposes of VA contracting by enacting an explicit order of priority among small-business contracting preferences. 38 U.S.C. 8127(i).

37 years, without applying the Rule of Two or soliciting and awarding new contracts when that Rule was satisfied. Congress also amended Section 644(j) in 1994, after 16 years of government-wide practice under that statute, without altering the command that "[e]ach contract" within a specified dollar range "shall" be presumptively reserved for small businesses. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3338. The 1994 amendment did not suggest that Congress was dissatisfied with the FAR provisions that treated Section 644(j) as inapplicable to the placement of orders under pre-existing FSS contracts. *E.g.*, 48 C.F.R. 8.404(a) (1994).

In 2010, when Congress first created a small-business preference that applied to FSS orders, it referred specifically to "orders placed against multiple award contracts." 15 U.S.C. 644(r)(2). The Senate Report explained that "[t]he Small Business Act and the [FAR] require Federal agencies to set contracts aside for small businesses if there is a reasonable expectation that two or more small businesses would submit bids at reasonable prices. *However, these general set-aside requirements have been interpreted not to apply to multiple-award contracts.*" 2010 Senate Report 7 (emphasis added). Rather than rejecting that view of existing law, Congress mandated the promulgation of regulations that would allow agencies, "at their discretion," to use small-business set-asides when placing orders under FSS contracts. 15 U.S.C. 644(r); see p. 28, *supra*. Section 644(r) thus strongly reinforces the conclusion that the mandatory set-aside established by Section 644(j) does not apply to FSS

orders—and that Section 8127 is similarly inapplicable.[8]

The broader historical context further reinforces the point. When Congress first enacted Section 644(j) in 1978, it had already been established practice for nearly twenty years under federal regulations that small-business set-aside requirements applied when soliciting and awarding new contracts. See 24 Fed. Reg. 3585 (May 5, 1959) (Department of Defense regulations to be codified at 32 C.F.R. 1.706-5(a) and (b)

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[8] Since 2007, the GSA and the Small Business Administration have taken conflicting positions over whether Section 644(j) applies to procurements conducted under pre-existing FSS contracts. See Letter from John W. Klein, Assoc. Gen. Counsel, Procurement Law, Small Business Admin., to Paula A. Williams, Office of Gen. Counsel, GAO (Aug. 21, 2015) (on file with the Office of the Solicitor General) (arguing that Section 644(j) applies in this context); Letter from Michael D. Tully, Senior Assistant Gen. Counsel, Personal Prop. Div., GSA, to Paula A. Williams, Office of Gen. Counsel, GAO (Sept. 16, 2015) (on file with the Office of the Solicitor General) (arguing that it does not). Acting in consultation with the Small Business Administration, the FAR Council previously rejected a request to amend the FAR to mandate small-business set-asides for FSS orders within Section 644(j)'s dollar range. See 69 Fed. Reg. 34,232 (June 18, 2004). The FAR Council promulgates the FAR and consists of the Secretary of Defense and the Administrators of GSA, NASA, and the Office of Federal Procurement Policy. 41 U.S.C. 1302(a)-(b), 1303(a)(1). The FAR Council explained that adoption of that proposal "would fundamentally alter the schedules program in terms of the efficiency and effectiveness of the overall program by increasing the administrative burden on agencies without having demonstrated that the change[] would, in fact, benefit small business over the long term." 69 Fed. Reg. at 34,232. This brief reflects the position of the United States, which is that Section 644(j), both historically and in its current form, does not apply to the placement of orders under pre-existing FSS contracts.

(Supp. 1960)); 41 C.F.R. 1-1.706-5(a) and (b) (1964) (same under civilian regulations); see also *J.H. Rutter Rex Mfg. Co.* v. *United States*, 706 F.2d 702, 705 (5th Cir.) (discussing history of Rule of Two), cert. denied, 464 U.S. 1008 (1983). And it was also already long-established that the procedures for placing FSS orders did *not* involve set-asides. See 32 C.F.R. 5.100-5.105 (Supp. 1960); 41 C.F.R. 101-26.401-1, 101-26.402-1 (1965). Instead, when placing FSS orders, agencies applied a substantive preference whereby, when all else was equal, an FSS order would be placed with a small business rather than a large one. See 41 C.F.R. 1-1.711, 101-26.408-4(b) (1968).

When enacting Section 644(j), Congress did not indicate an intent to break from this longstanding practice and to reach FSS orders. Congress instead chose to refer only to reserving "contract[s]." 15 U.S.C. 644(j). Congress subsequently enacted socioeconomic contracting preferences one by one, years apart, again using language like "awards contracts"—after the FAR had already made it clear that Section 644(j)'s contracting preference did not apply to FSS orders. See Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 303(b), 102 Stat. 3869 (adding a contracting preference for small businesses owned by socially and economically disadvantaged individuals); HUBZone Act of 1997, Pub. L. No. 105-135, § 602, 111 Stat. 2627 (HUBZone businesses); Small Business Programs Reauthorization Act of 2000, Pub. L. No. 106-554, App. I, § 811, 114 Stat. 2763A-708 (small businesses owned by women); Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2662 (SDVOSBs). Congress has thus enacted contracting preferences on multiple occasions

over the span of decades, with ample opportunity to direct that these preferences apply when placing FSS orders. Yet Congress did not do so. This statutory and historical context strongly suggests that, as under the statutes on which Section 8127 was modeled, Section 8127's procedures for "award[ing] contracts" do not apply when the VA places orders under pre-existing FSS contracts.

5. Requiring the VA to apply Section 8127 before placing FSS orders would seriously impair the agency's ability to deliver high-quality care to veterans

a. The ability to place orders under the FSS is often essential to the VA's effective and expeditious performance of its obligations to veterans. If the VA needs more angioplasty stents, laparoscopes, critical-care beds, or surgical scrubs; if a mortuary freezer for preserving deceased veterans' remains is broken; if a VA hospital needs more laboratory analysis services; or if a VA hospital needs to fill temporary vacancies for cardiologists or nurses; then the VA can open a GSA website, check three listings or review three quotes, and select the one that provides the best value and lowest overall cost alternative. See 48 C.F.R. 8.405-1(c)-(d), 8.405-2(c). On petitioner's view, however, the VA cannot procure goods or services from the FSS—and perhaps cannot procure goods or services from any government source—unless and until a VA contracting officer has performed the market research needed to make a Rule of Two determination or to support a sole-source award. And whenever the Rule of Two is satisfied, the VA would be required under petitioner's approach to solicit and award a new contract on a sole-source basis or via competition restricted to VOSBs.

That approach would seriously disrupt the VA's operations. Although a Rule of Two determination can be relatively swift, depending on the size and circumstances of the procurement, see 48 C.F.R. 10.002, 810.002, it always requires reasonable effort. See *Information Ventures, Inc.*, B-294267, 2004 CPD ¶ 205, at 3-4 (Comp. Gen. Oct. 8, 2004). The VA reported that in fiscal year 2009, it engaged in more than 200,000 transactions, and approximately 60% of those were via the FSS. *2009 Goaling Report* 1; see 74 Fed. Reg. at 64,624. Adding new obstacles to tens of thousands of procurements annually would significantly increase the VA's burden, likely force the VA to hire many more contracting officers, and delay the VA's acquisition of important medical supplies and services.

The consequences would be particularly severe in any procurement where the VA would otherwise have used the FSS but finds that the Rule of Two is satisfied. In that situation, the VA would be forced to solicit and award a new contract on the open market, which takes more time and effort than placing an order under a pre-existing FSS contract for which the applicable procedural requirements have already been satisfied. See *FSS Contracting* 41 (FSS procurement "translates into significant savings for customer agencies in terms of resources and costs"); GSA Office of Inspector Gen., *Limited Audit of Federal Supply Service's Contracting for Services Under Multiple Award Schedule Contracts* 2-3 (Jan. 9, 2001), http://www.gsaig.gov/?LinkServID=6d21dead-0a20-9ff2-cd6d275b115ebd95 (use of the FSS avoids the "cumbersome and administratively costly traditional procurement process").

For certain supplies or services—such as medical or surgical supplies, laboratory services, medical professional staffing, or a mortuary freezer—delay could be harmful or offensive to the veterans the VA strives to serve. For mundane low-cost or repetitive procurement needs, a requirement that the VA apply the Rule of Two could cause administrative costs and delay far out of proportion to the value of the contract (and thus far out of proportion to the likely effect of a set-aside on the achievement of the Secretary's goals). Indeed, the VA has previously faced bid protests based on petitioner's interpretation of Section 8127 when the VA used the FSS to buy "two griddles and one food slicer," *Aldevra*, B-405271, 2011 CPD ¶ 183, at 1 (Comp. Gen. Oct. 11, 2011) (*Aldevra I*), and one "ice maker/dispenser," *Aldevra*, B-406205, 2012 CPD ¶ 112, at 1 (Comp. Gen. Mar. 14, 2012) (*Aldevra II*). See Pet. Br. 18-21, 35, 49-50 (discussing *Aldevra I* and *Aldevra II*).

Interpreting Section 8127 to apply to FSS procurement would also raise serious questions about other important VA procurement vehicles. For example, the VA buys $4 billion worth of pharmaceuticals annually by placing numerous orders under an indefinite-delivery contract that allows for fast web-based ordering and "just-in-time" delivery. Office of Acquisition & Logistics, *Pharmaceutical Prime Vendor*, http://www.va.gov/oal/business/nc/ppv.asp (last visited Sept. 28, 2015). It is unclear whether or how, under petitioner's interpretation of Section 8127(d), a VA hospital's placement of an order for additional penicillin under that indefinite-delivery contract could be distinguished from the FSS order at issue in this case. It is similarly unclear whether

petitioner's approach would allow a VA hospital to procure medical supplies from another VA hospital's excess, or from the excess held by another federal agency, rather than soliciting and awarding a new contract under the Rule of Two. Petitioner's argument likewise calls into question the VA's authority to modify, or to exercise an option under, a pre-existing contract without following the Rule of Two procedures that Section 8127(d) prescribes when the agency "award[s] contracts."

While the costs associated with petitioner's approach would be substantial, the benefits to VOSBs would be uncertain and limited. Many VOSBs already have FSS schedule contracts and the VA often places FSS orders with VOSBs. In 2011, 13% of the VA's FSS spending dollars went to VOSBs. Pet. App. 4a. That exceeded the VA's goal for VOSBs in 2011, which was 12%. *Id.* at 9a. The burdens associated with a Rule of Two assessment would be particularly pointless in those instances where the VA would otherwise have used the FSS to procure the same goods or services from a VOSB. Cf. note 8, *supra* (explaining that the FAR Council declined to impose mandatory small-business set-asides for FSS orders generally, based on its determination that such an approach would burden agencies without producing demonstrable benefits to small businesses) (quoting 69 Fed. Reg. at 34,232).

b. Petitioner contends (Br. 37) that its position "will not cause any fiscal waste" because Section 8127 ensures that the VA will pay a "fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(d). An important benefit of indefinite-delivery contracts, however, is that they provide

agencies the cost advantage associated with high-volume buying, even in circumstances where the dollar value of each individual task order is relatively small. See Office of Inspector Gen., *Audit of Veterans Health Administration Open Market Medical Equipment and Supply Purchases*, at i (July 21, 2009), http://www.va.gov/oig/52/reports/2009/VAOIG-08-01519-172.pdf (finding that awarding new contracts on the open market rather than placing FSS orders wasted approximately $8 million per year at the Veterans Health Administration). Petitioner's approach would deprive the VA of that advantage. And even if the price were the same, petitioner's interpretation would still cause harm and fiscal waste through disruption, overhead, and delay.

The sole-source procedures authorized by subsections (b) and (c) do not eliminate the red tape, delay, and waste described above. The absence of competition generally increases the risk that the VA will pay inflated prices or procure from a source that is not actually responsible. Cf. 41 U.S.C. 3301, 3303. To guard against those risks, agencies ordinarily must conduct time-consuming inquiries before making a sole-source award. *Inter alia*, before awarding a sole-source contract under subsection (b) or (c), a contracting officer ordinarily must perform adequate research to make a determination that the vendor is a responsible source and that "[a]ward can be made at a fair and reasonable price." 48 C.F.R. 819.7007(a)(3)-(4), 819.7008(a)(3)-(4). The VA still must ordinarily "synopsize[]" the opportunity and publicize it in advance, 48 C.F.R. 819.7007(a)(2), 819.7008(a)(2), and the contracting officer must justify in writing, certify the justification, and, depending on the amount, obtain

approval of the choice to award a sole-source contract. See 41 U.S.C. 3304(e); 48 C.F.R. 6.303-1, 6.303-2, 6.304, 806.304. And although the VA could in some circumstances award a sole-source contract swiftly with fewer protections, doing so would maximize the risks to the VA those protections guard against.[9]

6. The VA's procurement regime, including the agency's continued placement of orders under pre-existing FSS contracts, is consistent with the purposes of Section 8127

As petitioner explains (Br. 2-3, 41-43), Congress enacted Section 8127 to address the shortcomings of the discretionary government-wide contracting preference for SDVOSBs by providing the VA with unique tools and duties. Contrary to petitioner's contention, however, the VA's procurement regime is fully consistent with those statutory purposes.

Under the 2006 Veterans Act, the VA is the only agency that sets goals and applies contracting preferences for VOSBs generally, rather than solely for SDVOSBs. Compare 38 U.S.C. 8127(a)-(d), with 15 U.S.C. 644(g)(1)(A)(ii), 657f(a) and (b). The VA is the

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[9] If Section 8127(d) is read to apply to task orders under pre-existing FSS contracts, the VA would also face significant problems satisfying its requirements through FSS set-asides. Section 8127's procedures can be used to award contracts only to VOSBs that are verified in the VA's database, 38 U.S.C. 8127(e) and (f)(4). GSA awards FSS contracts based on contractor self-certification, without reference to the VA's database. See 48 C.F.R. 8.405-5(a). Accordingly, the VA could not use an FSS schedule's designation of a firm as a VOSB as the basis for an FSS set-aside compliant with Section 8127. In any event, petitioner has stated that it was not listed on the particular FSS schedule used here, see CFC Doc. 22, at 3 (Sept. 18, 2012), and thus could not have benefitted from an FSS set-aside.

only agency that is empowered to enter into sole-source contracts with SDVOSBs (and VOSBs) regardless of whether the Rule of Two is satisfied. Compare 38 U.S.C. 8127(b)-(c), with 15 U.S.C. 657f(a)(1)-(3). The VA is the only agency that must give first and second priority to contracting preferences for SDVOSBs and VOSBs. Compare 38 U.S.C. 8127(i), with 48 C.F.R. 19.203(a)-(c). And under Section 8127(d) and the VA's regulations, the VA is the only agency that must consider a preference for VOSBs whenever it solicits and awards a new contract on the open market. Compare 38 U.S.C. 8127(d) and 48 C.F.R. 819.7005(a), 819.7006(a), with 15 U.S.C. 657f(b) and 48 C.F.R. 19.1405(a)(1).

In enacting Section 8127, Congress sought to ensure that the VA's use of SDVOSB and VOSB contractors would be greater than it had been in the past, and that the VA would serve as a model for other federal agencies. Congress did not intend, however, that the interest in increasing opportunities for veteran-owned businesses should take precedence in *every* VA procurement over the achievement of competing agency objectives. Through its procurement practices, including consideration of a VOSB preference whenever the agency solicits and awards a contract on the open market, the VA "put[s] veteran businesses at the head of the line for small business set-asides." *A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the House Comm. on Veterans' Affairs*, 109th Cong., 2d Sess. 1 (2006) (statement of Rep. Boozman, Chairman). But the VA needs the flexibility to purchase under pre-existing government contracts in order to put caring for veterans at the head of the line of its overall mission.

7. The pro-veteran canon of statutory construction is inapposite here

The canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991), does not alter the analysis. Petitioner has not identified (Br. 44) any government-contracting case in which a court has applied that canon. Application of the canon would be especially unwarranted here, since the decision whether to utilize the FSS in any particular procurement can require the VA to balance the competing interests of different classes of veterans.

Construing Section 8127(d) to cover the placement of orders under pre-existing FSS contracts, thereby requiring the VA to forgo use of the FSS and instead to solicit and award a new contract on the open market whenever the Rule of Two is satisfied, would help some veterans who own small businesses. See 73 Fed. Reg. 49,141 (Aug. 20, 2008). That approach would harm other veterans, however, by imposing delays and administrative costs that would impede the VA's ability to provide high-quality benefits and care. See *United States* v. *Oregon*, 366 U.S. 643, 647 (1961) ("Many veterans * * * have had to depend upon these benefits for long periods of their lives."). In any particular procurement, petitioner's approach would also favor veteran-owners whose businesses are *not* listed on the relevant FSS schedule (who can win an award only if a new contract is solicited) over those whose businesses *are* listed (who could have won under the FSS). The pro-veteran canon of construction does not help to resolve such competing considerations, as all veterans have "drop[ped] their own affairs

to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); cf. *Burden* v. *Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (canon inapposite for dispute between the surviving spouses and the children of deceased veterans), cert. denied, 134 S. Ct. 2134 (2014).

The VA has also issued controlling regulations here, and this Court has never suggested that the pro-veteran canon overrides deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Cf. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-744 (1996) (rejecting argument that the presumption against preemption "trumps *Chevron*"). Indeed, such a ruling could undermine every VA regulation that addresses veterans' benefits.

B. The VA's Interpretation Of Section 8127 Warrants Judicial Deference

As explained above, Section 8127(d) applies by its terms only when the VA "award[s] contracts." 38 U.S.C. 8127(d). In light of the statutory and regulatory background against which Congress enacted Section 8127(d), that language is best understood not to encompass the placement of orders under *pre-existing* FSS or other indefinite-delivery contracts. To the extent ambiguity remains after consideration of the provision's text and context, the VA has promulgated regulations that preserve its ability to place orders under pre-existing FSS contracts, without applying small-business contracting preferences. See 48 C.F.R. 808.405-2, 819.7005, 819.7006, 819.7007, 819.7008. For the reasons set forth above, the VA's interpretation of Section 8127 is reasonable and warrants deference under *Chevron*, 467 U.S. at 844.

Petitioner contends (Br. 46-52) that, notwithstanding the government's consistent position, the VA's regulations actually make Section 8127 mandatory in all procurements. That is incorrect. It is true that, under the VA's regulations, the analysis conducted by the agency *when it awards a new contract on the open market* does not depend on whether the agency is satisfying or will satisfy the annual goals established by the Secretary pursuant to 38 U.S.C. 8127(a). See 48 C.F.R. 819.7005(a), 819.7006(a). VA contracting officers thus must always consider VOSB set-asides when they award new contracts. The VA's regulations do not suggest, however, that the agency must apply the Rule of Two before placing an order under a pre-existing FSS contract.

In construing the applicable regulatory provisions, "[t]he VAAR must be utilized in conjunction with the FAR. The VAAR cannot be utilized by itself." 48 C.F.R. 801.101(b) (2007). In particular, the VA's regulations convey meaning not only by what they say, but also by where they say it. "Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title." 48 C.F.R. 1.303(a). Parts 808 and 819 thus build upon Parts 8 and 19, respectively. The VA's regulations in Part 808 do not depart from the government-wide rule in Part 8 that FSS task and delivery orders have priority over soliciting and awarding new contracts to commercial sources on the open market. See 48 C.F.R. 8.002(a), 808.002(a). And the VA's regulations in Parts 808 and 819—including its regulations here in Subpart 819.70—do not depart from the government-wide rule in Parts 8 and 19 that

agencies can place FSS orders without applying small-business contracting preferences or other procedures that govern the solicitation and award of new contracts on the open market. See 48 C.F.R. 819.7005, 819.7006, 819.7007, 819.7008; see also 48 C.F.R. 8.404(a), 19.502-1(b); pp. 10-12, *supra* (describing pertinent FAR provisions).

By plugging its regulations into these precise places in the FAR framework, without deviating from the government-wide rules established by the corresponding FAR provisions, the VA retained its ability to place FSS orders without considering small-business contracting preferences. These VA regulations, including their placement in Parts 808 and 819, were promulgated through notice-and-comment rulemaking and warrant *Chevron* deference. See 73 Fed. Reg. at 49,148-49,150; 74 Fed. Reg. at 64,630-64,636. Indeed, thousands of pages of agency-specific acquisition regulations are based on similar principles and must be understood in the context of their placement within the Code. *E.g.*, 48 C.F.R. Pt. 219 (supplementing Part 19 for the Department of Defense); 48 C.F.R. Pt. 319 (same for Department of Health and Human Services); 48 C.F.R. Pt. 419 (Department of Agriculture); 48 C.F.R. Pt. 519 (GSA).

The preamble to the VA regulations reflects the agency's contemporaneous understanding of its own rules. The preamble states that Section 8127 "does not apply to FSS task or delivery orders," and that the descending list of priority set forth in FAR Part 8 "will continue to apply to VA FSS task/delivery orders." 74 Fed. Reg. at 64,624. "Further, VA will continue to follow GSA guidance regarding applicability of [FAR P]art 19," which provides that "set-asides

do not apply to FAR [P]art 8 FSS acquisitions." *Ibid.* The preamble also explains that "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule." *Ibid.* That explanation reflects an accurate understanding of the text and context of the regulations, including their placement within the FAR. At most, the regulations are ambiguous as to their application to FSS orders, and the agency's contemporaneous understanding of the effect of its own regulations warrants deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).[10]

C. Petitioner's Suggestion That The VA May Not Have Achieved The Secretary's SDVOSB And VOSB Contracting Goals For Prior Years Provides No Basis For Reversing The Judgment Below

1. Section 8127 requires the VA to establish contracting goals for SDVOSBs and VOSBs, and it con-

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[10] The government argued below that it "may continue to use the FSS without regard to the Rule of Two," that petitioner's interpretation renders the Secretary's power to set goals superfluous, and that the VA's interpretation warrants deference. Br. in Opp. 21; see *id.* at 14-15, 20-23; see also J.A. 18 ("[T]he VA maintains that FSS acquisitions are not impacted by VA's SDVOSB/VOSB authority."); Gov't C.A. Br. 12, 29-35; CFC Doc. 23, at 10, 19-21 (Oct. 9, 2012). Insofar as this brief grounds those arguments in the difference between placing an order under a pre-existing FSS contract and awarding a new contract, that rationale is consistent with the CFC's decision, see Pet. App. 38a-39a; with the VA's position in the *Aldevra* protests, see J.A. 6-7, 8-9; with the VA's contemporaneous explanation in the regulatory preamble, see 74 Fed. Reg. at 64,624; and with longstanding practice under the FAR, *e.g.*, 48 C.F.R. 38.101(e).

tains other mandatory requirements that increase the likelihood that the goals will be met. But the VA always has discretion to place FSS task and delivery orders without applying Section 8127(d)'s contracting preference. Like other socioeconomic contracting programs, success or failure in meeting goals can influence how contracting officers exercise their discretion, but it does not create or eliminate that discretion. See *J.H. Rutter Rex Mfg.*, 706 F.2d at 711; see also *Crandal* v. *Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) (courts of appeals "unanimously agree[] that the Small Business Act does not create a private right of action in individuals" to enforce goals). Congress has established only one program that required set-asides "[i]f a participating agency has failed to attain its small business participation goal," and it imposed that requirement expressly. Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, § 713(b), 102 Stat. 3892, repealed by 2010 Jobs Act § 1335, 124 Stat. 2543. Congress did not use similar language here.

2. Even if the VA's failure to meet its goals could disable it from placing orders under FSS contracts, the judgment below should be affirmed. The procurement here occurred in fiscal year 2012, and the VA has certified that it exceeded its 2012 goals. Pet. App. 9a. Petitioner contends (Br. 24 n.2, 39-40) that it is difficult to assess the VA's success and that "the statistics are inaccurate," but petitioner does not assert that the VA actually fell short in 2012.

No record evidence would support such an allegation. Petitioner notes (Br. 24 n.2) that the VA's Inspector General found that the VA "may" have failed

to meet its goals in 2010 and before, primarily because VOSBs subcontracted too much work to non-veteran subcontractors. Office of Inspector Gen., *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011), http://www.va.gov/oig/52/reports/2011/VAOIG-10-02436-234.pdf. In 2010, Congress addressed those problems by amending Section 8127 to impose additional subcontractor-verification requirements. Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868. The VA has certified that it exceeded its goals for each year since then. Pet. App. 9a.

Petitioner also notes (Br. 24 n.2) that a senior VA official, acting as a putative whistleblower, alleged in 2015 that the total-spending figures certified by the agency "may" have been "understated by as much as $6B to $10B annually," primarily because the VA's reported figures excluded non-VA care. Letter from Jan R. Frye, Deputy Assistant Sec'y for Acquisition & Logistics, VA, to Robert A. McDonald, Sec'y, VA 3 (Mar. 19, 2015) (on file with the Office of the Solicitor General). The record in this case does not include any evidence supporting that allegation. But even taking as true the most extreme version of the official's allegation—*i.e.*, that the VA should have reported an additional $10 billion in spending and that no portion of that additional spending went to VOSBs—the VA still exceeded its 2012 goals. For 2012, VA reported that it had spent $17.52 billion, including $3.37 billion on SDVOSBs and $3.81 billion on VOSBs. *2012 Goaling Report* 1. Even if the VA's actual spending was $27.52 billion and the reported amounts spent on SDVOSBs and VOSBs are held constant, 12.25% of

the VA's spending went to SDVOSBs and 13.85% to VOSBs. Because the VA's goals for those groups were 10% and 12%, respectively, Pet. App. 9a, the VA officer's allegation does not cast doubt on the agency's achievement of its goals for 2012.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 38 U.S.C. 8127 provides:

Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) USE OF RESTRICTED COMPETITION.—Except provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) ELIGIBILITY OF SMALL BUSINESS CONCERNS.—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) DATABASE OF VETERAN-OWNED BUSINESSES. —(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns.

(2)(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary

such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(g) ENFORCEMENT PENALTIES FOR MISREPRESENTATION.—(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals

in the business concern for a period of not less than five years.

(h) TREATMENT OF BUSINESSES AFTER DEATH OF VETERAN-OWNER.—(1) Subject to paragraph (3), if the death of a veteran causes a small business concern to be less than 51 percent owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans.

(2) The period referred to in paragraph (1) is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(A) The date on which the surviving spouse remarries.

(B) The date on which the surviving spouse relinquishes an ownership interest in the small business concern.

(C) The date that is ten years after the date of the veteran's death.

(3) Paragraph (1) only applies to a surviving spouse of a veteran with a service- connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability.

(i) PRIORITY FOR CONTRACTING PREFERENCES.—Preferences for awarding contracts to small business

concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(j) APPLICABILITY OF REQUIREMENTS TO CONTRACTS.—(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(k) ANNUAL REPORTS.—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(*l*) DEFINITIONS.—In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" means a small business concern—

(A)(i) not less than 51 percent of which is owned by one or more veterans or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(ii) the management and daily business operations of which are controlled by one or more veterans; or

(B) not less than 51 percent of which is owned by one or more veterans with service-connected disabilities that are permanent and total who are unable to manage the daily business operations of such concern or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more such veterans.

2. 38 U.S.C. 8128 provides:

Small business concerns owned and controlled by veterans: contracting priority

(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business

concern also meets the requirements of that contracting preference.

(b) DEFINITION.—For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

3. 15 U.S.C. 637 provides in pertinent part:

Additional powers

(a) Procurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; definitions; eligibility; determinations; publication; recruitment; construction subcontracts; annual estimates; Indian tribes

(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. * * * A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(B) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts;

* * * * *

(D)(i) A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if—

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and

(II) the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.

* * * * *

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business

concern" means any small business concern which meets the requirements of subparagraph (B) and—

(i) which is at least 51 per centum unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—

(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I),

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II), or

(iii) Native Hawaiian organizations described in subparagraph (A)(i)(III) or subparagraph (A)(ii)(III).

(C) Each Program Participant shall certify, on an annual basis, that it meets the requirements of this paragraph regarding ownership and control.

* * * * *

(m) Procurement program for women-owned small business concerns

* * * * *

(2) Authority to restrict competition

In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if—

(A) each of the concerns is not less than 51 percent owned by one or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(B) the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by women will submit offers for the contract;

(C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3);

(D) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price; and

(E) each of the concerns—

(i) is certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or

(ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance with standards established by the Administration, to support such certification.

* * * * *

4. 15 U.S.C. 644 provides in pertinent part:

Awards or contracts

(a) Determination

To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Govern-

ment property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. * * * A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price.

* * * * *

(g) Goals for participation of small business concerns in procurement contracts

(1) GOVERNMENTWIDE GOALS.—

(A) ESTABLISHMENT.—The President shall annually establish Governmentwide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disad-

vantaged individuals, and small business concerns owned and controlled by women in accordance with the following:

(i) The Governmentwide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year.

(ii) The Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iii) The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iv) The Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(v) The Governmentwide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime

contract and subcontract awards for each fiscal year.

(B) ACHIEVEMENT OF GOVERNMENTWIDE GOALS.—Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Small Business Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Governmentwide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Such goals shall separately

address prime contract awards and subcontract awards for each category of small business covered.

* * * * *

(j) Small business reservation

(1) Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 but not greater than $100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than $100,000 under the authority of subsection (a) of section 637 of this title, section 2323 of title 10, section 712[1] of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

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[1] See References in Text note below.

(r) Multiple award contracts

Not later than 1 year after September 27, 2010, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, at their discretion—

(1) Set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10 and section 4106(c) of title 41, set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

5. 15 U.S.C. 657a (2006) provides in pertinent part:

HUBZone program

(a) In general

There is established within the Administration a program to be carried out by the Administrator to

provide for Federal contracting assistance to qualified HUBZone small business concerns in accordance with this section.

(b) Eligible contracts

* * * * *

(2) Authority of contracting officer

Notwithstanding any other provision of law—

(A) a contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern, if—

(i) the qualified HUBZone small business concern is determined to be a responsible contractor with respect to performance of such contract opportunity, and the contracting officer does not have a reasonable expectation that 2 or more qualified HUBZone small business concerns will submit offers for the contracting opportunity;

(ii) the anticipated award price of the contract (including options) will not exceed—

(I) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(II) $3,000,000, in the case of all other contract opportunities; and

(iii) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price;

(B) a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price; and

(C) not later than 5 days from the date the Administration is notified of a procurement officer's decision not to award a contract opportunity under this section to a qualified HUBZone small business concern, the Administrator may notify the contracting officer of the intent to appeal the contracting officer's decision, and within 15 days of such date the Administrator may file a written request for reconsideration of the contracting officer's decision with the Secretary of the department or agency head.

* * * * *

6. 15 U.S.C. 657f provides in pertinent part:

Procurement program for small business concerns owned and controlled by service-disabled veterans

(a) Sole source contracts

In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if—

(1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;

(2) the anticipated award price of the contract (including options) will not exceed—

(A) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(B) $3,000,000, in the case of any other contract opportunity; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(b) Restricted competition

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

(c) Relationship to other contracting preferences

A procurement may not be made from a source on the basis of a preference provided under subsection (a)

or (b) of this section if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 or chapter 85 of title 41.

* * * * *

7. 40 U.S.C. 501 provides in pertinent part:

Services for executive agencies

(a) AUTHORITY OF ADMINISTRATOR OF GENERAL SERVICES.—

(1) IN GENERAL.—The Administrator of General Services shall take action under this subchapter for an executive agency—

(A) to the extent that the Administrator of General Services determines that the action is advantageous to the Federal Government in terms of economy, efficiency, or service; and

(B) with due regard to the program activities of the agency.

* * * * *

(b) PROCUREMENT AND SUPPLY.—

(1) FUNCTIONS.—

(A) IN GENERAL.—The Administrator of General Services shall procure and supply personal property and nonpersonal services for executive agencies to use in the proper discharge of their responsibilities, and perform functions re-

lated to procurement and supply including contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting.

* * * * *

(2) POLICIES AND METHODS.—

(A) IN GENERAL.—The Administrator of General Services shall prescribe policies and methods for executive agencies regarding the procurement and supply of personal property and nonpersonal services and related functions.

(B) CONTROLLING REGULATION.—Policies and methods prescribed by the Administrator of General Services under this paragraph are subject to regulations prescribed by the Administrator for Federal Procurement Policy under division B (except sections 1704 and 2303) of subtitle I of title 41.

* * * * *

8. 41 U.S.C. 152 provides in pertinent part:

Competitive procedures

In division C, the term "competitive procedures" means procedures under which an executive agency enters into a contract pursuant to full and open competition. The term also includes—

* * * * *

(3) the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under those procedures result in the lowest overall cost alternative to meet the needs of the Federal Government;

(4) procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for those procurements are permitted to compete.

* * * * *

9. 41 U.S.C. 1121 provides in pertinent part:

General authority

* * * * *

(b) FEDERAL ACQUISITION REGULATION.—To the extent that the Administrator considers appropriate in carrying out the policies and functions set forth in this division, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. The policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation.

(c) POLICIES TO BE FOLLOWED BY EXECUTIVE AGENCIES.—

(1) AREAS OF PROCUREMENT FOR WHICH POLICIES ARE TO BE FOLLOWED.—The policies implemented in the Federal Acquisition Regulation shall be followed by executive agencies in the procurement of—

(A) property other than real property in being;

(B) services, including research and development; and

(C) construction, alteration, repair, or maintenance of real property.

(2) PROCEDURES TO ENSURE COMPLIANCE.—The Administrator shall establish procedures to

ensure compliance with the Federal Acquisition Regulation by all executive agencies.

(3) APPLICATION OF OTHER LAWS.—The authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in this section and sections 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title.

* * * * *

10. 41 U.S.C. 3301 provides:

Full and open competition

(a) IN GENERAL.—Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall—

(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) APPROPRIATE COMPETITIVE PROCEDURES.—

(1) USE OF SEALED BIDS.—In determining the competitive procedures appropriate under the circumstance, an executive agency shall—

(A) solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) SEALED BID NOT REQUIRED.—Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e)[1] of title 23 applies.

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[1] See References in Text note below. Section 204 of title 23, referred to in subsec. (b)(2), was repealed and a new section 204 enacted by Pub. L. 112-141, div. A, title I, § 1119(a), July 6, 2012, 126 Stat. 473, 489.

(c) EFFICIENT FULFILLMENT OF GOVERNMENT REQUIREMENTS.—The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Federal Government's requirements.

APPENDIX B

2011 Edition

Title 48—Federal Acquisition Regulations System

CHAPTER 1 — FEDERAL ACQUISITION REGULATION

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. 48 C.F.R. 1.303 (2011) provides:

Publication and codification.

(a) Agency-wide acquisition regulations shall be published in the FEDERAL REGISTER as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104-1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. 48 C.F.R. 8.000 (2011) provides:

Scope of part.

This part deals with the acquisition of supplies and services from or through Government supply sources.

3. 48 C.F.R. 8.002 (2011) provides:

Priorities for use of Government supply sources.

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority—

(1) *Supplies.* (i) Agency inventories;

(ii) Excess from other agencies (see subpart 8.1);

(iii) Federal Prison Industries, Inc. (see subpart 8.6);

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency

(see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points;

(vi) Mandatory Federal Supply Schedules (see subpart 8.4);

(vii) Optional use Federal Supply Schedules (see subpart 8.4); and

(viii) Commercial sources (including educational and nonprofit institutions).

(2) *Services.* (i) Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(ii) Mandatory Federal Supply Schedules (see subpart 8.4);

(iii) Optional use Federal Supply Schedules (see subpart 8.4); and

(iv) Federal Prison Industries, Inc. (see subpart 8.6), or commercial sources (including educational and nonprofit institutions).

(b) Sources other than those listed in paragraph (a) may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101- 25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies

when contractors purchase the supply items for Government use.

4. 48 C.F.R. 8.003 (2011) provides:

Use of other Government supply sources.

Agencies shall satisfy requirements for the following supplies or services from or through specified sources, as applicable:

(a) Public utility services (see part 41);

(b) Printing and related supplies (see subpart 8.8);

(c) Leased motor vehicles (see subpart 8.11);

(d) Strategic and critical materials (e.g., metals and ores) from inventories exceeding National Defense Stockpile requirements (detailed information is available from the Defense National Stockpile Center, 8725 John J. Kingman Rd., Suite 3229, Fort Belvior, VA 22060-6223; and

(e) Helium (see subpart 8.5—Acquisition of Helium).

Subpart 8.4—Federal Supply Schedules

5. 48 C.F.R. 8.402 (2011) provides in pertinent part:

General.

(a) The Federal Supply Schedule program is also known as the GSA Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.002) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies (*e.g.*, GSA has delegated authority to the VA to procure medical supplies under the VA Federal Supply Schedules program). Orders issued under the VA Federal Supply Schedule program are covered by this subpart. Additionally, the Department of Defense (DoD) manages similar systems of schedule-type contracting for military items; however, DoD systems are not covered by this subpart.

* * * * *

6. 48 C.F.R. 8.404 (2011) provides in pertinent part:

Use of Federal Supply Schedules.

(a) *General.* Parts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts (but see 8.405-5). BPAs and orders placed against a MAS, using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)). Therefore, when establishing a BPA (as authorized by 13.303-2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but *see* paragraph (g) of this section.

(b)(1) The contracting officer, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the contracting officer responsible for placing the order.

(2) For orders over $500,000, *see* subpart 17.5 for additional requirements for interagency acquisitions. For example, the requiring agency shall make a determination that use of the Federal Supply Schedule is the best procurement approach, in accordance with 17.502-1(a).

(c) *Acquisition planning.* Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

(d) *Pricing.* Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (*e.g.*, installation, maintenance, and repair). GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405-2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's

needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

* * * * *

7. 48 C.F.R. 8.405 (2011) provides:

Ordering procedures for Federal Supply Schedules.

Ordering activities shall use the ordering procedures of this section when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules. For establishing BPAs and for orders under BPAs *see* 8.405-3.

8. 48 C.F.R. 8.405-5 (2011) provides:

Small business.

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at *http://www.gsa.gov/fss* contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

PART 19—SMALL BUSINESS PROGRAMS

Subpart 19.2—Policies

9. 48 C.F.R. 19.201 (2011) provides in pertinent part:

General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such

concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

* * * * *

10. 48 C.F.R. 19.203 (2011) provides:

Relationship among small business programs.

(a) There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15).

(b) *At or below the simplified acquisition threshold.* The requirement to exclusively reserve acquisitions for small business concerns at 19.502-2(a) does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program. If the contracting officer does not proceed with a small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase.

(c) *Above the simplified acquisition threshold.* The contracting officer shall first consider an acquisition for the 8(a), HUBZone, SDVOSB, or WOSB programs before using a small business set-aside (*see* 19.502-2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to its release in accordance with 13 CFR parts 124, 125 and 126.

(d) Small business set-asides have priority over acquisitions using full and open competition. *See* requirements for establishing a small business set-aside at subpart 19.5.

Subpart 19.5—Set-Asides for Small Business

11. 48 C.F.R. 19.501 (2011) provides in pertinent part:

General.

(a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A "set-aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

(b) The determination to make a small business set-aside may be unilateral or joint. A unilateral determination is one that is made by the contracting

officer. A joint determination is one that is recommended by the Small Business Administration (SBA) procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) and concurred in by the contracting officer.

(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, service-disabled veteran-owned, or WOSB programs. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

* * * * *

12. 48 C.F.R. 19.502-1 (2011) provides:

Requirements for setting aside acquisitions.

(a) The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when—

(1) It is determined to be in the interest of maintaining or mobilizing the Nations full productive capacity, war or national defense programs; or

(2) Assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns; and the circumstances described in 19.502-2 or 19.502-3(a) exist.

(b) This requirement does not apply to purchases of $3,000 or less ($15,000 or less for acquisitions as described in 13.201(g)(1)), or purchases from required sources of supply under Part 8 (*e.g.*, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

13. 48 C.F.R. 19.502-2 (2011) provides:

Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the

requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract as described in 19.203.

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that:

(1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (see paragraph (c) of this section); and

(2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 as to partial set-asides). Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

(c) For small business set-asides other than for construction or services, any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufac-

turer unless the SBA has granted either a waiver or exception to the nonmanufacturer rule (see 19.102(f)). In industries where the SBA finds that there are no small business manufacturers, it may issue a waiver to the nonmanufacturer rule (see 19.102(f) (4) and (5)). In addition, SBA has excepted procurements processed under simplified acquisition procedures (see part 13), where the anticipated cost of the procurement will not exceed $25,000, from the nonmanufacturer rule. Waivers permit small businesses to provide any firm's product. The exception permits small businesses to provide any domestic firm's product. In both of these cases, the contracting officer's determination in paragraph (b)(1) of this subsection or the decision not to set aside a procurement reserved for small business under paragraph (a) of this subsection will be based on the expectation of receiving offers from at least two responsible small businesses, including nonmanufacturers, offering the products of different concerns.

14. 48 C.F.R. 19.502-4 (2011) provides:

Methods of conducting set-asides.

(a) Total small business set-asides may be conducted by using simplified acquisition procedures (see part 13), sealed bids (see part 14), or competitive proposals (see part 15). Partial small business set-asides may be conducted using sealed bids (see part 14), or competitive proposals (see part 15).

(b) Except for offers on the non-setaside portion of partial set-asides, offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

Subpart 38.1—Federal Supply Schedule Program

15. 48 C.F.R. 38.101 (2011) provides:

General.

(a) The Federal Supply Schedule program, pursuant to 41 U.S.C. 259(b)(3)(A), provides Federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographic area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas. The schedule contracting office issues Federal Supply Schedule publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics.

(b) Each schedule identifies agencies that are required to use the contracts as primary sources of supply.

(c) Federal agencies not identified in the schedules as mandatory users may issue orders under the schedules. Contractors are encouraged to accept the orders.

(d) Although GSA awards most Federal Supply Schedule contracts, it may authorize other agencies to award schedule contracts and publish schedules. For example, the Department of Veterans Affairs awards schedule contracts for certain medical and nonperishable subsistence items.

(e) When establishing Federal Supply Schedules, GSA, or an agency delegated that authority, is responsible for complying with all applicable statutory and regulatory requirements (*e.g.*, Parts 5, 6, and 19). The requirements of parts 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders and BPAs placed under resulting schedule contracts (except *see* 8.404).

CHAPTER 8—DEPARTMENT OF VETERANS AFFAIRS

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

16. 48 C.F.R. 801.000 (2011) provides:

Scope of part.

This part sets out general Department of Veterans Affairs (VA) Acquisition Regulation (VAAR) policies, including information regarding the maintenance and administration of the VAAR, acquisition policies and practices, and procedures for deviation from the VAAR and the Federal Acquisition Regulation (FAR).

Subpart 801.1—Purpose, Authority, Issuance

17. 48 C.F.R. 801.101 (2011) provides:

Purpose.

(a) VA established the VAAR to codify and publish uniform policies and procedures for VA's acquisition of supplies and services, including construction.

(b) The VAAR implements and supplements the FAR.

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

18. 48 C.F.R. 808.002 (2011) provides:

Priorities for use of Government supply sources.

(a) *Supplies.* (1) As used in FAR 8.002(a)(1)(i), the term "agency inventories" includes Supply Fund Stock and VA Excess.

(2) A national committed use contract awarded by the VA National Acquisition Center has a priority between wholesale supply sources (FAR 8.002(a)(1)(v)) and mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)).

(3) Federal Supply Schedule contracts awarded by the VA National Acquisition Center in Federal Supply Classification (FSC) Groups 65 and 66 shall be mandatory for use by VA and shall have the same order of priority as mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)). VA contracting officers must place orders against Federal Supply Schedules contracts awarded by the VA National Acquisition Center in FSC Groups 65 and 66 in the following descending order of priority:

(i) Nationally awarded Blanket Purchase Agreements (BPAs), issued by the VA National Acquisition Center against Federal Supply Schedules.

(ii) Multi-VISN, single-VISN, or locally awarded BPAs, issued by VISN, regional, or local VA contracting officers against Federal Supply Schedules.

(iii) Federal Supply Schedules without BPAs.

(4) Indefinite delivery indefinite quantity (IDIQ) contracts, awarded by VISN, regional, or local facility VA contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts shall have an order of priority between optional use Federal Supply Schedules (FAR 8.002(1)(a)(vii)) and commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)). VA contracting officers must place delivery orders against IDIQ contracts, awarded by VISN, regional, or a local facility contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts in the following descending order of priority:

(i) VISN or regionally awarded contracts.

(ii) Locally awarded contracts.

(5) Open market purchases (purchases not falling within any of the higher priorities in paragraphs (a)(2) through (4) of this section) have the same priority as commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)).

(b) *Unusual or compelling urgency.* The contracting officer may use a source lower in priority than as specified in paragraph (a) of this section when the need for supplies or services is of an unusual or compelling urgency (see FAR 6.302-2). The Contracting Officer must include a justification for each deviation in the procurement file.

(c) *Eligible Beneficiaries.* (1) A contracting officer may authorize an acquisition from the Veterans Canteen Service or a commercial source when a VA healthcare official (e.g., social worker, physician) determines that personal selection of shoes, clothing, and incidentals will result in a therapeutic benefit to an eligible beneficiary.

(2) The contracting officer must cite Federal Prison Industries, Inc., clearance No. 1206 in the purchase document for any purchase from a commercial source of dress shoes similar to Federal Prison Industries, Inc., Style No. 86-A.

Subpart 808.4—Federal Supply Schedules

19. 48 C.F.R. 808.402 (2011) provides:

General.

The Executive Director and Chief Operating Officer, VA National Acquisition Center, advertises, negotiates, awards, administers, and issues the Federal Supply Schedules for Federal Supply Classification Groups 62, 65, and 89 and for cost-per-test services under Group 66.

20. 48 C.F.R. 808.405-2 (2011) provides:

Ordering procedure for services requiring a statement of work.

When placing an order or establishing a BPA for supplies or services requiring a statement of work, the ordering activity, when developing the statement of work and any evaluation criteria in addition to price, shall adhere to and apply the evaluation factor commitments at 815.304-70.

PART 819—SMALL BUSINESS PROGRAMS

Subpart 819.5—Set-Asides for Small Business

21. 48 C.F.R. 819.502 (2011) provides:

Setting aside acquisitions.

22. 48 C.F.R. 819.502-2 (2011) provides:

Total small business set-asides.

(a) When a total small business set-aside is made, one of the following statements, as applicable, will be included in the solicitation for bids:

(1) Notice of total small business set-aside, page __, applies to all items in this solicitation.

(2) Notice of total small business set-aside, page __, applies to items __ through __ in this solicitation.

(b) Contracting officers must ensure that the appropriate product or service classification and the related size standard are included in each solicitation.

Subpart 819.70—Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

23. 48 C.F.R. 819.7001 (2011) provides:

General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

24. 48 C.F.R. 819.7002 (2011) provides:

Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

25. 48 C.F.R. 819.7003 (2011) provides:

Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the requirements in FAR 19.102(f) to receive a benefit under this program.

26. 48 C.F.R. 819.7004 (2011) provides:

Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

27. 48 C.F.R. 819.7005 (2011) provides:

Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

28. 48 C.F.R. 819.7006 (2011) provides:

Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

29. 48 C.F.R. 819.7007 (2011) provides:

Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

30. 48 C.F.R. 819.7008 (2011) provides:

Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

31. 48 C.F.R. 819.7009 (2011) provides:

Contract clauses.

The contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219-11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart

Supreme Court, U.S.
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No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Department of Veterans Affairs procurements at issue in this case have been fully performed and, if so, whether the case is moot.

TABLE OF CONTENTS

Page

A. Each of the VA procurements at issue in this case was fully performed by May 31, 2013 2
B. This case is not moot 4
C. This Court should either reschedule this case for argument and affirm the judgment below, or vacate that judgment to allow the court of appeals to decide the mootness issue in the first instance 14

TABLE OF AUTHORITIES

Cases:

Alcoa, Inc. v. *Bonneville Power Admin.*, 698 F.3d 774 (9th Cir. 2012) 9
Anderson v. *United States*, 344 F.3d 1343 (Fed. Cir. 2003) 6
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 5
Armstrong v. *FAA*, 515 F.3d 1294 (D.C. Cir. 2008) 11
Distributed Solutions, Inc. v. *United States*, 539 F.3d 1340 (Fed. Cir. 2008) 7
Guardian Moving & Storage Co. v. *Interstate Commerce Comm'n*, 952 F.2d 1428 (D.C. Cir. 1992) 9
Kingdomware Techs.—Costs, B-406228.2, 2012 CPD ¶ 157 (Comp. Gen. May 10, 2012) 3
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 7, 8
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 8
Public Utils. Comm'n v. *FERC*, 236 F.3d 708 (D.C. Cir. 2001) 5

Cases—Continued: Page

Rocks v. *City of Phila.*, 868 F.2d 644 (3d Cir. 1989) 11
Roe v. *Wade*, 410 U.S. 113 (1973) 8
Service Disabled Veteran Owned Small Bus. Network, Inc. v. *United States*, 110 Fed. Cl. 664 (2013) 7
Southern Pac. Terminal Co. v. *Interstate Commerce Comm'n*, 219 U.S. 498 (1911) 8, 9, 10
Spencer v. *Kemna*, 523 U.S. 1 (1998) 1, 7, 8, 12
United States v. *Juvenile Male*, 131 S. Ct. 2860 (2011) 5, 7, 8, 12
Valley Constr. Co. v. *Marsh*, 714 F.2d 26 (5th Cir. 1983) 11
Weeks Marine, Inc. v. *United States*, 575 F.3d 1352 (Fed. Cir. 2009) 6

Constitution, statutes and regulation:

U.S. Const.:
Art. I 6
Art. III 4, 6, 7
Equal Access to Justice Act, 28 U.S.C. 2412(d) 7
15 U.S.C. 644(r)(2) 12
28 U.S.C. 171(a) 6
28 U.S.C. 1491(b)(1) 6, 10
38 U.S.C. 8127(d) 5, 12, 15, 16
48 C.F.R. 8.405-5(a) (2014) 12

Miscellaneous:

15 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2015) 11
13C Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2008 & Supp. 2015) 11

In the Supreme Court of the United States

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KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The United States respectfully submits this supplemental brief in response to this Court's order of November 4, 2015. Although the three procurements at issue in this case have been fully performed, the case is not moot because the current controversy between the parties is "capable of repetition, yet evading review." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (citation omitted).

So long as petitioner continues to compete to provide the Department of Veterans Affairs (VA) with emergency-notification and other information technology (IT) services, it will likely experience on a regular basis the same harm that it alleges here. The VA places thousands of orders for such services each year under Federal Supply Schedule (FSS) or similar preexisting contracts. As the government understands petitioner's business, petitioner could compete to perform at least some of those services if, rather than placing FSS orders for which petitioner is not an au-

thorized vendor, the VA were instead to solicit and award wholly new contracts on the open market.

VA orders for emergency-notification services and other ongoing IT services often (as in this case) have a base period with a fixed end date that is a year or less away. And even when the VA exercises an option to extend a procurement for such services, the total period of performance is frequently less than two years. The sequence of events that occurred in this case, in which the services that were the subject of the challenged procurements were completed well before this Court had an opportunity to rule on the merits of petitioner's claims, therefore is likely to be repeated in future cases that present the same underlying legal issue.

Although a preliminary injunction or stay can extend the window for judicial review of some contracts and orders for services, a stay cannot prevent a fixed end date from arriving. Because the procurements at issue here were for the performance of ongoing services during particular intervals of time with fixed end dates, petitioner's failure to seek a stay or similar interim relief should not preclude it from invoking the "capable of repetition, yet evading review" exception to ordinary mootness principles. And it is well-settled that, for purposes of that exception, two years is an insufficient period of time to obtain review in this Court. Accordingly, this case is not moot.

A. Each Of The VA Procurements At Issue In This Case Was Fully Performed By May 31, 2013

Petitioner challenged three VA procurements for emergency-notification services. For each procurement, the relevant services were completely performed by May 31, 2013.

1. Petitioner protested an order that the VA had placed with LiveProcess, Inc., on September 30, 2011. Decl. of Cordyon Ford Heard III (Decl.) ¶ 6; see Am. Compl. ¶¶ 27-43. The VA placed that order under LiveProcess's pre-existing FSS contract. Decl. ¶ 6. The order was to implement an emergency-notification system for the VA San Francisco Medical Center through a subscription to Live Process Enterprise, an emergency notification system sold by LiveProcess. Am. Compl. ¶¶ 28-29; see Decl. ¶ 6. The order also provided for accompanying services, including operation, maintenance, and training on the system's use. Decl. ¶ 6. The subscription and accompanying services expired, and performance was completed, by September 14, 2012. *Ibid.*

2. Petitioner challenged the VA's exercise of an option with LiveProcess to extend a similar order for a subscription to LiveProcess, with accompanying operation, maintenance, and training services, for a network of nine medical centers and associated outpatient clinics. Am. Compl. ¶¶ 44-50; see Decl. ¶ 7; see also *Kingdomware Techs.—Costs*, B-406228.2, 2012 CPD ¶ 157, at 1-2 (Comp. Gen. May 10, 2012). That subscription expired, and performance was completed, by September 30, 2012. Decl. ¶ 7.

3. Petitioner protested a VA order for emergency-notification services at four VA medical centers and associated outpatient clinics. J.A. 30; see Am. Compl. ¶¶ 51-60. That order was the subject of stipulated facts and is described in the parties' merits briefs in this Court. See J.A. 30-32; see also Pet. Br. 21-22; U.S. Br. 18-19. On February 22, 2012, the VA placed the order with Everbridge Inc., under its pre-existing FSS Blanket Purchase Agreement. J.A. 31. The

award became effective March 1, 2012, and provided for a one-year base period of performance, with two options to extend performance, each for one additional year. *Ibid.* The VA exercised the first option to extend the time to May 31, 2013, and Everbridge completed performance by that date. Decl. ¶ 8.

4. As anticipated, see J.A. 30, the VA now has an emergency-notification system intended to operate VA-wide. Decl. ¶ 10. But that system is not fully deployed, and the VA continues to procure emergency-notification systems for particular VA centers. *Ibid.* Since May 31, 2013, when performance of the procurements at issue here ended, the VA has placed 13 more orders for emergency-notification services, and it "expects to continue doing so." *Ibid.* Reflecting the critical nature of emergency-notification services, those orders usually require the implementation of a fully functional emergency-management and notification software system either immediately (if the order goes to the incumbent) or within days of the order (if a new provider must be phased in). *Ibid.* The orders further require that the vendor then operate and maintain the system, as well as provide training related to its use, "for a base period that lasts until a fixed end date, ordinarily one year or less away." *Ibid.* As in this case, the orders also "often have options to extend performance for additional years." *Ibid.* "[I]n practice, the total period of performance on such orders, including options, is typically less than two years." *Ibid.*

B. This Case Is Not Moot

"It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint

is filed.'" *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). This case involves a challenge to three VA procurements for emergency-notification services, and performance of those services was completed by May 31, 2013. "Ordinarily, it would seem readily apparent that a challenge to an expired contract is moot, because the court could provide no relief to the allegedly aggrieved parties." *Public Utils. Comm'n* v. *FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001). This case is not moot, however, because the same legal issue is likely to recur in future controversies between the same parties, under circumstances where (as here) the period of contract performance is too short to allow full judicial review before performance is complete.

1. With respect to the specific procurements that were identified in petitioner's complaint, no effective judicial relief remains available, since the relevant services have been fully performed.

a. Petitioner sued in the United States Court of Federal Claims (CFC), asserting that the VA had violated 38 U.S.C. 8127(d) in conducting the three procurements described above. Am. Compl. ¶ 2. As relief, petitioner sought a permanent injunction requiring the VA (1) to terminate the two task orders and the option; and (2) to issue a solicitation on the open market for "the remaining term of the requirement[s]," on the basis of competition restricted to small businesses owned and controlled by service-disabled veterans (SDVOSBs). Am. Compl., Prayer for Relief (Relief) ¶¶ 1(b), 2(a); see *id.* ¶ 3(a). Petitioner also sought declaratory relief. *Id.* ¶¶ 1(c) and (d), 2(b) and (c), 3(b).

Because performance of the procured emergency-notification services is now complete, a court can no longer enjoin further performance of those services. A court likewise cannot require the VA to conduct a new solicitation for any "remaining term," because no term remains. For the same reason, a declaration that these awards were unlawful and should be re-solicited would have no practical impact on the performance of the services that were the subject of the challenged procurements, since those services have been completed for the periods of time at issue.

b. Petitioner also initially sought to have the CFC broadly declare unlawful and enjoin the VA's procedures for placing orders under pre-existing contracts. *E.g.*, Relief ¶¶ 1(b)-(e). The CFC is an Article I court, 28 U.S.C. 171(a), with jurisdiction to hear suits "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," 28 U.S.C. 1491(b)(1).[1] Under Section 1491(b)(1), the CFC lacks "jurisdiction to grant injunctive or declaratory relief for violations of law not connected with a procurement action to which plaintiff is an interested party." CFC Doc. 18, at 2 (Aug. 21, 2002) (Mot. to Dismiss Order). The CFC has bid-protest jurisdiction only when an interested party alleges a statutory or regulatory violation in connection with a particular procurement or proposed pro-

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[1] In exercising its statutory jurisdiction, the CFC applies Article III case-or-controversy requirements. See *Weeks Marine, Inc.* v. *United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009); *Anderson* v. *United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

curement. See *Distributed Solutions, Inc.* v. *United States*, 539 F.3d 1340, 1344-1345 (Fed. Cir. 2008); *Service Disabled Veteran Owned Small Bus. Network, Inc.* v. *United States*, 110 Fed. Cl. 664, 667 (2013).

Based on those principles, the CFC correctly dismissed petitioner's generalized claims for relief as beyond its jurisdiction. Mot. to Dismiss Order 2. Because petitioner did not pursue those broad requests on appeal, see Pet. C.A. Br. 3; Pet. i; Pet. Br. 1-59, they are no longer part of this case. Petitioner also initially sought a money judgment for bid-protest costs, Relief ¶ 1(a), and reasonable fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d), Relief ¶¶ 1(g), 2(f), and 3(d). Petitioner voluntarily dismissed the claim for bid-protest costs, however, see Mot. to Dismiss Order 1, and the possibility of obtaining attorney's fees is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

2. For the foregoing reasons, no form of judicial relief remains available that would affect the specific procurements that were the focus of petitioner's complaint. This case is not moot, however, because it fits within the narrow exception for disputes that are "capable of repetition, yet evading review." *Spencer*, 523 U.S. at 17 (citation omitted). That exception "applies only where '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Juvenile Male*, 131 S. Ct. at 2865 (brackets in original) (quoting *Spencer*,

523 U.S. at 17). Those requirements are satisfied here.

a. The "challenged action" in this case—the VA's solicitation and award of orders to perform custom emergency-notification services—is "in its duration too short to be fully litigated prior to cessation or expiration." *Juvenile Male*, 131 S. Ct. at 2865 (quoting *Spencer*, 523 U.S. at 17). The narrow "capable of repetition, yet evading review" exception applies when "the opportunity for remedy" is of "inherently short duration," *Lewis*, 494 U.S. at 481, as with a pregnancy, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), such that full litigation (including appellate review) is impossible. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976) (challenge to a protective order barring press coverage of a criminal trial would "evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived").

Challenged conduct lasting two years or less generally evades review unless interim judicial relief can preserve the opportunity for consideration. That is especially so when the challenged conduct, like the emergency-notification-services orders here, has a fixed end date. No injunction can stay the march of time. In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911) (*Southern Pacific*), for example, this Court held that it had power to review a challenge to an Interstate Commerce Commission rate order that was scheduled to remain in effect for two years, lest review of the questions involved be "defeated * * * by short term orders, capable of repetition, yet evading review." *Id.* at 515; see *id.* at 514. For this reason, courts of appeals have found that disputes concerning short-term

contracts with fixed end dates are capable of repetition, yet evading review. *E.g.*, *Alcoa, Inc.* v. *Bonneville Power Admin.*, 698 F.3d 774, 786-787 (9th Cir. 2012) (challenge to initial period of contract to sell electricity with defined end date); *Guardian Moving & Storage Co.* v. *Interstate Commerce Comm'n*, 952 F.2d 1428, 1430, 1432 (D.C. Cir. 1992) (grant of temporary authority to operate a motor carrier, where the authority had a maximum statutory duration of 270 days).

VA orders for emergency-notification services share these characteristics, and a challenge to their lawfulness would evade review if it became moot when performance was complete. As explained above, the VA continues to procure site-specific emergency-notification services. See p. 4, *supra*. Orders for these kinds of services typically require immediate implementation of a fully-functional system, coupled with operation and maintenance of that system for a base period of one year or less, with options to extend for additional years. *Ibid.* This basic structure is also commonly used for other kinds of IT-service orders as well. *Ibid.* One year is too short to allow full judicial review of a dispute concerning the procurement's legality. See *Southern Pac.*, 219 U.S. at 514-515.

To be sure, the FSS orders at issue here also included options to extend the period of time during which the relevant services would be performed. But a disappointed bidder cannot know in advance whether the VA will ultimately exercise an option to extend the period of performance. And even when the VA fully exercises the options available under the terms of such a procurement, the total period of performance is still often two years or less, as it was for each

of the orders challenged here. Decl. ¶ 10. Two years is also too short for full judicial review. *Southern Pac.*, 219 U.S. at 514-515. And because the base periods and any subsequent options established by the orders here had fixed end dates, a stay of performance would not have allowed judicial review to be completed before the procurements expired by their terms. Decl. ¶ 10. Although it is difficult to generalize for all of the different kinds of IT-related VA orders for which petitioner may be an "interested party," 28 U.S.C. 1491(b)(1), other kinds of VA orders for IT services outside the emergency-notification context are also "often structured this way, with a fixed base period of one year or less plus options to extend the period of performance." Decl. ¶ 10.

In some circumstances, interim judicial relief may prevent completion of particular challenged conduct, and thus prolong the period during which a dispute as to that conduct's legality remains live. The effectiveness of such relief in preserving a live dispute will depend in part on the nature of the service to be performed and, in particular, on the manner in which completion of that service is defined. Performance of a contract to repair a vehicle, for example, is not completed until the vehicle is fixed. A stay that delays that occurrence may prolong a live dispute as to who will perform the work. A contract to perform security services at a particular facility during calendar year 2013, by contrast, cannot be performed after that year ends. A stay or injunction might prevent the government from acquiring those services at all, but it would not prolong the existence of a live dispute as to who will perform them, since the contracted-for services by their nature cannot be performed at a later date.

Where interim judicial relief would have preserved the plaintiff's ability to perform the relevant contract if its challenge had ultimately prevailed, courts of appeals have consistently held that a challenger who failed to request such relief "may not, barring exceptional circumstances, later claim his case evaded review." *Armstrong* v. *FAA*, 515 F.3d 1294, 1297 (D.C. Cir. 2008); see 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.99[1], at 101-416 & n.16 (3d ed. 2015) (similar). But when an injunction or stay would not have prolonged the period during which the controversy remained live, courts have not required challengers to seek interim relief before invoking the "capable of repetition, yet evading review" exception to ordinary mootness principles. See pp. 8-9, *supra*. Those remedies would not have been effective here, given the facts of this case and the nature of petitioner's challenge. See 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.8, at 382-383 & n.13 (3d ed. 2008 & Supp. 2015) ("[D]isputes over the terms or awards of government contracts * * * often involve short contract periods and repeat bidders."); see also *Rocks* v. *City of Phila.*, 868 F.2d 644, 646-647 (3d Cir. 1989); *Valley Constr. Co.* v. *Marsh*, 714 F.2d 26, 28 (5th Cir. 1983). Because the orders at issue here were for the performance of ongoing services during discrete time periods with fixed end dates, an injunction against performance would not have preserved the opportunity for review, but instead would only have threatened to prevent the VA from fulfilling a critical need for those discrete periods. See Decl. ¶ 10.

b. There is also a "reasonable expectation" that petitioner—"the same complaining party"—will again

be denied contracting opportunities when the VA places orders under FSS or similar pre-existing contracts rather than soliciting new contracts for which petitioner might wish to compete. *Juvenile Male*, 131 S. Ct. at 2865 (quoting *Spencer*, 523 U.S. at 17). The VA applies Section 8127(d) each time it solicits and awards new contracts on the open market, but never when it places orders under pre-existing contracts. See U.S. Br. 20-31. When placing orders under pre-existing FSS contracts, the VA "may, at [its] discretion," limit competition for those orders to SDVOSBs that already have pre-existing contracts on the relevant FSS schedule. 15 U.S.C. 644(r)(2); see 48 C.F.R. 8.405-5(a) (2014). Petitioner could not have been awarded the FSS orders at issue here, however, because its pre-existing FSS contract did not authorize it to compete for these categories of IT services. See CFC Doc. 22, at 3 (Sept. 18, 2012).

Petitioner contends (Br. 26-27) that, before placing orders under the FSS or "turning to other sources of supply," the VA must first look at the market as a whole to assess whether there is a reasonable expectation that two or more SDVOSBs will submit offers and whether award can be made at a fair and reasonable price. Petitioner argues that, if the VA has such an expectation, the VA cannot lawfully place an order under a pre-existing contract but must instead award a wholly new contract on the open market, on the basis of competition restricted to SDVOSBs. This choice between the VA's approach and petitioner's interpretation of Section 8127(d) will have a practical impact on petitioner in every future procurement where petitioner would have competed for a wholly new contract if one had been solicited, but the VA

instead chooses to place an FSS order for services within a category as to which petitioner is not an authorized FSS vendor.

Given the nature of petitioner's business and the breadth of its position, such procurements likely will be numerous. Petitioner is an SDVOSB, J.A. 33, that has been awarded several contracts and purchase orders (*i.e.*, wholly new government contracts), as well as delivery orders under pre-existing government contracts. See Decl. ¶ 12. Since mid-2011, petitioner's contracts and delivery orders have all been for various kinds of IT services. *Ibid.* Petitioner's website asserts that petitioner "provides web, software, and technology solutions to enterprise problems," and that it "specialize[s] in providing web, client, network and mobile application solutions for government." *Id.* ¶ 11 (brackets in original). Based on the allegations in this case and statements on petitioner's website, the government's understanding is that petitioner focuses on performing emergency-notification services, similar to the services that the VA procured through the FSS orders that petitioner challenged here, but also offers a broader array of IT services. See *id.* ¶¶ 11-15. Petitioner has done business with the government as recently as September 23, 2015. *Id.* ¶ 13.

Even when looking narrowly at FSS orders for emergency-notification services at particular VA centers, the issue in this case has already recurred 13 times since May 2013, and the VA expects it will continue to recur in the future. Decl. ¶ 10; see p. 4, *supra*. Looking more broadly at other kinds of IT-service orders, the issue will likely recur even more often. Current data indicate that "from fiscal year 2012 through fiscal year 2015, the VA placed approxi-

mately 342,000 task and delivery orders under pre-existing contracts, for an average of approximately 85,500 per year." Decl. ¶ 14. "Of those total orders, approximately 160,000 were placed under FSS contracts, for an average of approximately 40,000 per year." *Ibid.* Current data further indicate that, during this same span, "the VA placed a total of approximately 15,500 orders in the nine industry sectors for which Kingdomware[ ]is a registered SDVOSB," including 3991 orders placed under the FSS. *Id.* ¶ 15. Although it is unclear how many VA orders in the future actually will be for the sorts of IT services that petitioner provides and where the same legal issue here would recur, it will clearly recur on many future occasions.

C. This Court Should Either Reschedule This Case For Argument And Affirm The Judgment Below, Or Vacate That Judgment To Allow The Court Of Appeals To Decide The Mootness Issue In The First Instance

For the reasons set forth above, this case is not moot. Accordingly, this Court should reschedule the case for oral argument, and it should affirm the judgment of the court of appeals for the reasons stated in the government's brief.

In the alternative, the Court may wish to vacate the court of appeals' judgment and to remand for further consideration in light of the briefing before this Court. If the "capable of repetition, yet evading review" exception to mootness principles does not apply in this case, then the case became moot when the last of the challenged procurements was completed (*i.e.*, by May 31, 2013), well before the court of appeals entered its judgment on June 3, 2014. Petitioner argued below that the case was not moot, on the

ground that "this continuing dispute is likely to evade review because such short contract terms do not provide sufficient time for the matter to be litigated fully." Pet. C.A. Br. 54. The government did not contest the Federal Circuit's jurisdiction, and the court of appeals did not address mootness when it decided this case on the merits. Because the mootness issue would not independently warrant this Court's review, the Court may wish to allow the court of appeals to resolve that question, and any resulting effect on its judgment, in the first instance.

Vacatur and remand for further proceedings would also permit the court of appeals, if it concludes that the case is not moot, to reconsider the merits of petitioner's challenge to the procurements at issue here in light of the briefing in this Court. As that briefing makes clear, the parties agree that Section 8127(d)'s set-aside procedures are mandatory, not discretionary, when the VA solicits and awards new contracts on the open market. Compare Pet. Br. i, with U.S. Br. 25. The dispute between the parties concerns whether Section 8127(d) applies to the VA's placement of orders under FSS and similar pre-existing contracts.

The CFC focused on that issue and deferred to the VA's conclusion that Section 8127(d) does not apply to FSS orders. See Pet. App. 66a-71a. The court of appeals, by contrast, did not rely on the distinction between FSS orders and solicitations of new contracts on the open market. That court instead appeared to conclude more generally that, so long as the VA meets its goals for participation by SDVOSBs and veteran-owned small businesses (VOSBs) in VA contracts, the set-aside procedures described in Section 8127(d) are

discretionary in both types of procurement. See *id.* at 19a-21a.

The court of appeals correctly recognized that petitioner's interpretation of Section 8127(d) would render superfluous the statutory directive that the VA establish contracting goals for VOSBs and SDVOSBs. See U.S. Br. 31-33. But, to the extent the court viewed Section 8127(d) set-asides as discretionary even when the VA solicits and awards new contracts on the open market, its analysis is not consistent with the position of the United States. If this Court chooses to vacate the judgment below and remand for initial consideration of the mootness question by the court of appeals, and if that court concludes on remand that this case is not moot, further consideration of the merits by the court of appeals might be of benefit to this Court.

* * * * *

For the foregoing reasons, this case is not moot. For the reasons set forth in the United States' merits brief, the judgment of the court of appeals should be affirmed. In the alternative, this Court may wish to vacate the judgment below and remand the case to allow the court of appeals to address the mootness issue in the first instance.

Respectfully submitted.

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No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. STATUS OF THE THREE PROCUREMENTS AT ISSUE 2

II. THERE IS A LIVE AND JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES 5

A. Capable Of Repetition 6

B. Evading Review 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 14

Deja Vu of Nashville, Inc. v. *Metropolitan Government of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) 10

Doe v. *Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991) 11

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 5, 6, 9

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 8, 10

Friends of the Earth, Inc. v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) 11

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) 9

Honeywell International, Inc. v. *NRC*, 628 F.3d 568 (D.C. Cir. 2010) 10

Johnson v. *Rancho Santiago Community College District*, 623 F.3d 1011 (9th Cir. 2010) 10, 11

Kinnett Dairies, Inc. v. *Farrow*, 580 F.2d 1260 (5th Cir. 1978) 6

Matter of Aldevra, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011) 3

Matter of Aldevra, 2012 WL 10245511 (Comp. Gen. Nov. 12, 2012) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Aldevra; Kingdomware Technologies, 2012 WL 10245509 (Comp. Gen. Oct. 9, 2012) 8, 11

Matter of Kingdomware Technologies, 2011 WL 6359474 (Comp. Gen. Dec. 19, 2011) 3

Matter of Kingdomware Technologies, 2012 WL 1942256 (Comp. Gen. May 30, 2012) 2

Matter of Kingdomware Technologies, 2013 WL 393193 (Comp. Gen. Jan. 31, 2013) 8, 11

Matter of Kingdomware Technologies—Costs, 2012 WL 1655097 (Comp. Gen. May 10, 2012) 4

Matter of Kingdomware Technologies—Reconsideration, 2012 WL 6463498 (Comp. Gen. Dec. 13, 2012) 9, 11

Matter of Legatus6, LLC, 2011 WL 7485203 (Comp. Gen. Dec. 5, 2011) 12

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 1, 5, 9

Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 6, 9

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 5, 10

Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) 10

Turner v. *Rogers*, 131 S. Ct. 2507 (2011) 1, 5, 6, 8

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 14

Weinstein v. *Bradford*, 423 U.S. 147 (1975) 5, 9

Wisconsin Department of Industry, Labor & Human Relations v. *Gould Inc.*, 475 U.S. 282 (1986) 10

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

31 U.S.C. § 1341(a)(1)(B) 12

38 U.S.C.
§ 8127 ..... 1, 8, 13
§ 8127(d) ..... *passim*
§ 8127(e)-(f) 7

41 U.S.C. § 6301(a) 12

Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 13

13 C.F.R. § 19.102 7

H.R. Rep. No. 109-592 (2006) 13

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

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Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA255P657SC1615* (Aug. 11, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA255P657SC1615 11

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA662C14446* (Sept. 29, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA662C14446 4

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24712F0325* (Dec. 1, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24712F0325 4

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24512F0622* (Feb. 22, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24512F0622 3

Federal Procurement Data System-Next Generation, *Transaction Report for HHS Award ID HHSN271201400201P* (Feb. 21, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201400201P 12

Federal Procurement Data System-Next Generation, *Transaction Report for Award ID W91CRB14F0017* (June 2, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=W91CRB14F0017 12

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA24612F4632* (July 31, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24612F4632 11

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Procurement Data System-Next Generation, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U 7, 11

Federal Procurement Data System-Next Generation, *Transaction Report for VA Award ID VA69D12F3663* (Sept. 28, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA69D12F3663 11

Wright, Charles Alan, et al., *Federal Practice and Procedure* (3d ed. 2008) 6

VA, *Vendor Information Pages: Kingdomware Technologies, Inc.*, https://www.vip.vetbiz.gov/Public/Search/ViewSearchResults.aspx?SCID=2753179 (last visited Nov. 20, 2015) 6

INTRODUCTION

Pursuant to the Court's order of November 4, 2015, Kingdomware files this supplemental brief to address (1) whether the Department of Veterans Affairs ("VA") procurements at issue in this case have been fully performed, and (2) if so, whether the case is moot.

Kingdomware is not a party to any of the three contracts at issue and thus cannot say with certainty whether any of them has been fully performed. Based on publicly available information, it appears that these contracts lasted 10-15 months and that all three contracts have been performed.

However, there is still a live controversy between Kingdomware and the government because the same scenario is likely—indeed, virtually certain—to repeat itself again and again in the future for contracts of comparably short duration. The case thus falls squarely within the "special category of disputes that are 'capable of repetition' while 'evading review,'" *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011), and therefore are not moot even though the specific "order attacked has expired," *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976). Indeed, disputes over government contracts are a paradigmatic example of controversies capable of repetition, yet evading review, particularly the types of contracts likely to elicit bids from small businesses like Kingdomware.

Service-disabled and veteran-owned small businesses have contested the VA's interpretation of 38 U.S.C. § 8127 for nearly a decade. During that time—including the three-and-a-half years that this suit has been pending—Kingdomware and other service-disabled and veteran-owned small businesses have re-

peatedly been deprived of the chance to compete on the terms Congress intended for a large number of VA contracts. This case represents the veteran-owned small business community's best and likely only realistic hope of securing review from this Court to force the VA to comply with the law. The question presented urgently requires an answer from this Court.

I. Status Of The Three Procurements At Issue

Kingdomware brought this action *pro se* in March 2012 in the Court of Federal Claims to challenge a series of VA procurements that the Government Accountability Office ("GAO") had found to be unlawful. Pet. App. 52a. With the benefit of *pro bono* counsel, Kingdomware filed an amended complaint in July 2012. *Id.* The amended complaint sought declaratory and injunctive relief as to three specific procurements, identified by the associated GAO bid protest number. In each case, the underlying contract now appears to have been fully performed.

A. GAO No. 406507. The first procurement, which was the primary focus of the proceedings below, involved an award for "emergency notification services" for a group of VA hospitals. Pet. Br. 21-22. The parties jointly stipulated to the facts concerning this contract award at summary judgment. JA30-32. In relevant part, a VA contracting officer issued Request for Quotation ("RFQ") No. VA245-12-Q-0078 to a single Federal Supply Schedule ("FSS") vendor, Everbridge Inc., on February 14, 2012, without first considering the Rule of Two in § 8127(d). JA31; *see also Matter of Kingdomware Techs.*, 2012 WL 1942256, at *2 (Comp. Gen. May 30, 2012) (noting that the "agency conducted market research prior to the acquisition and found that at least 20 [service-disabled veteran-owned small busi-

ness] concerns were capable of meeting the requirements at issue"). The contracting officer made a sole-source award directly to Everbridge, which is not a veteran-owned small business, on February 22, 2012. JA31. The contract covered a single base year, with options for two additional years. *Id.*

This contract was in effect for 15 months, ending in May 2013. The official online database of federal contract awards appears to indicate that the VA did not exercise either option year but did obtain a three-month extension of the initial term. *See* Federal Procurement Data System-Next Generation (FPDS-NG), *Transaction Report for VA Award ID VA24512F0622* (Feb. 22, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24512F0622.[1]

B. GAO No. 405727. The second contract at issue stemmed from the VA's issuance of RFQ No. VA-261-11-RQ-1514 on September 13, 2011, seeking quotations for "subscription and support services" for a one-year period for the VA San Francisco Medical Center. JA25; Am. Compl. ¶¶ 28-29. Kingdomware filed a bid protest with the GAO after the RFQ was issued, arguing in relevant part that the VA had failed to conduct any market research to determine whether competition for the award should be restricted to veteran-owned small businesses pursuant to § 8127(d). Am. Compl. ¶ 29. The GAO sustained the protest in December 2011. *Matter of Kingdomware Techs.*, 2011 WL 6359474, at *2-3 (Comp. Gen. Dec. 19, 2011) (citing *Matter of Aldevra*, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011)).

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[1] For all citations to FPDS-NG, pertinent contract details may be accessed by clicking "View" next to the Award ID.

The VA declined to comply with the GAO's decision. Am. Compl. ¶ 40.

The contract, in the form of an FSS delivery order, was in effect for approximately one year, ending in September 2012. *See* FPDS-NG, *Transaction Report for VA Award ID VA662C14446* (Sept. 29, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA662C14446. It was awarded to one of Kingdomware's direct competitors, LiveProcess Inc., which is not a veteran-owned small business. *See id.*

C. GAO No. 406228. The VA also awarded the third contract to LiveProcess by issuing a delivery order on November 28, 2011, under LiveProcess's FSS contract, without first considering whether § 8127(d) required setting aside the opportunity for competition restricted to veteran-owned small businesses. *See Matter of Kingdomware Techs.—Costs*, 2012 WL 1655097, at *1 (Comp. Gen. May 10, 2012); JA28; Am. Compl. ¶¶ 45-47. In defending this procurement in a bid protest filed by Kingdomware, the VA argued that it was actually an exercise of an option under a 2010 purchase order, but the VA was unable to substantiate that claim. *Kingdomware Techs.*, 2012 WL 1655097, at *1. The agency represented to the GAO that it would take corrective action by re-bidding the contract (*id.*), but it had not done so by the time Kingdomware filed the amended complaint (Am. Compl. ¶ 47).

The contract lasted 10 months, ending September 2012. *See* FPDS-NG, *Transaction Report for VA Award ID VA24712F0325* (Dec. 1, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24712F0325.

* * *

In sum, each of the three contracts at issue in this case lasted 10-15 months. Each appears to have been fully performed by no later than May 2013, while this case was pending in the courts below. Proceedings in the Claims Court alone lasted nine months, from March 2012 to December 2012, and would have been substantially longer if the parties had not agreed on procedures to streamline them. JA1-3, 30-32, 35. Proceedings in the Federal Circuit lasted approximately twice that long, from January 2013 to September 2014. JA4-5.

II. THERE IS A LIVE AND JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES

Even assuming the three specific contracts prompting this suit have been fully performed, there remains a live case or controversy between the parties necessitating this Court's resolution. This Court has long recognized "a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011) (quoting *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911)). In those cases, the Court's jurisdiction to resolve the dispute is not "defeated simply because the order attacked has expired." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976).

A dispute meets the "capable of repetition, yet evading review" standard when "'(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Turner*, 131 S. Ct. at 2515 (brackets omitted; quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)); *accord FEC*

v. *Wisconsin Right to Life, Inc.* (*WRTL*), 551 U.S. 449, 462 (2007).

The present dispute easily satisfies this standard. Indeed, controversies like this one, involving government procurement disputes, are "a paradigm" of the kind of cases likely to satisfy the "'capable of repetition yet evading review'" standard. *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978) (dispute over small business set-asides). "[D]isputes over the terms or awards of government contracts ... often involve short contract periods and repeat bidders," and thus are among the "most commonly encountered" situations that are capable of repetition yet evading review. 13C Wright et al., *Federal Practice and Procedure* § 3533.8 (3d ed. 2008) (footnotes omitted).

A. Capable Of Repetition

A controversy is "capable of repetition" when there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (internal quotation marks omitted); *accord Turner*, 131 S. Ct. at 2515 ("'reasonable' likelihood"); *Press-Enterprise Co.* v. *Superior Ct.*, 478 U.S. 1, 6 (1986) ("can reasonably be assumed"). Kingdomware's underlying dispute with the VA about the proper interpretation of § 8127(d) is virtually certain to recur and indeed has already recurred several times during the pendency of this litigation.

To start, Kingdomware remains a certified service-disabled veteran-owned small business listed in the VA's database. VA, *Vendor Information Pages: Kingdomware Technologies, Inc.*, https://www.vip.vetbiz.gov/Public/Search/ViewSearchResults.aspx?SCID=2753179

(last visited Nov. 20, 2015); JA33-34; Barton Decl. ¶ 3.[2] Kingdomware intends to maintain this status going forward. Barton Decl. ¶ 3; *see* 13 C.F.R. § 19.102 (size standards). Kingdomware thus remains eligible for restricted competition pursuant to the Rule of Two in § 8127(d). 38 U.S.C. § 8127(e)-(f).

Kingdomware also continues to offer a broad range of web, software, and database services, including custom computer programming, of the type that the VA and other government agencies routinely procure. Barton Decl. ¶¶ 4, 6. For example, a search of the FPDS-NG database reveals that, since this suit commenced, the VA has repeatedly issued delivery orders to enter into small to mid-sized contracts for "custom computer programming services."[3] Kingdomware has performed and is currently performing custom programming for other government agencies. *E.g.*, FPDS-NG, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.

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[2] Timothy Barton is the founder, owner, and Chief Executive Officer of Kingdomware. Concurrently with this filing, Kingdomware has submitted a request to lodge Mr. Barton's declaration attesting to certain facts that may facilitate the Court's consideration of the questions addressed in this supplemental brief.

[3] FPDS-NG, *List of Contract Actions*, https://www.fpds.gov/ezsearch/fpdsportal?s=FPDSNG.COM&sortBy=SIGNED_DATE&q=PRINCIPAL_NAICS_CODE%3A%22541511%22+DEPARTMENT_FULL_NAME%3A%22VETERANS+AFFAIRS%2C+DEPARTMENT+OF%22++SIGNED_DATE%3A%5B2012%2F03%2F15%2C2015%2F11%2F20%5D++AWARD_TYPE%3A%22delivery%22++OBLIGATED_AMOUNT%3A%5B25000%2C250000%5D&indexName=awardfull&y=13&x=14&templateName=1.4.4&desc=Y (last visited Nov. 20, 2015) (331 results in search for VA delivery orders between March 15, 2012 and November 20, 2015 for custom computer programming services valued between $25,000 and $250,000).

fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U (contract awarded to Kingdomware to provide "custom computer programming services" to NIH).

The VA has made clear that it will continue to use the FSS system to procure goods and services without first considering the Rule of Two in § 8127(d). JA8-10 (VA press release); *see also* U.S. Br. 23 (asserting that the VA may procure from the FSS "without applying Section 8127's preference for awarding new contracts" (capitalization altered)). The VA has also acknowledged that, depending on the year, anywhere from 20% to 60% of its procurements are conducted via the FSS. Opp. 10; U.S. Br. 40. Its stated policy of not applying § 8127(d) to FSS procurements thus implicates numerous transactions each year.

Given Kingdomware's demonstrated and persistent effort to obtain contracts from the VA and the VA's entrenched unwillingness to apply § 8127(d) as written, there is a "'reasonable' likelihood," *Turner*, 131 S. Ct. at 2515, if not a virtual certainty, that the same underlying dispute between the parties will be repeated in the future. Kingdomware's bid protests vividly illustrate that likelihood. By the time Kingdomware filed its amended complaint in this action, it had already filed at least nine bid protests with the GAO concerning the VA's failure to apply the Rule of Two. JA25. During this litigation, Kingdomware filed several additional protests with the GAO. *E.g.*, *Matter of Aldevra; Kingdomware Techs.* (*Kingdomware I*), 2012 WL 10245509 (Comp. Gen. Oct. 9, 2012); *Matter of Kingdomware Techs.* (*Kingdomware III*), 2013 WL 393193 (Comp. Gen. Jan. 31, 2013). A dispute that has *already* recurred during the pendency of litigation is manifestly "capable of repetition," as this Court has recognized. *See Turner*, 131 S. Ct. at 2515 (finding reasonable like-

lihood of repetition in part based on recurrence of dispute following expiration of challenged action); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 775 & n.10 (1978) (threat of further enforcement against appellant during appeal of previous enforcement action further supported likelihood of repetition).

The rate of Kingdomware's formal protests slowed considerably after the VA repeatedly refused to follow the GAO's recommendations, prompting the GAO to announce that although it stood by its interpretation of § 8127(d), it would no longer hear bid protests on the issue because protestors could not "obtain meaningful relief" from the VA. *Matter of Kingdomware Techs.—Reconsideration* (*Kingdomware II*), 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012). The decline in protests after the GAO's announcement, however, in no way indicates that the underlying problem has ceased to affect Kingdomware. Barton Decl. ¶ 7. The company remains highly interested in contracting opportunities with the VA and continues to be affected by the VA's refusal to apply the Rule of Two to the FSS. *Id.* ¶¶ 5, 8.

B. Evading Review

1. A controversy evades review when "'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration.'" *WRTL*, 551 U.S. at 462. If a challenged action is "by nature short-lived," such that it would evade "considered plenary review in this Court" even when it recurs, the case is not moot. *Nebraska Press Ass'n*, 427 U.S. at 547; *see also Press-Enterprise Co.*, 478 U.S. at 6 (dispute evades review when the challenged conduct is "typically of short duration"); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979) (evades review where challenged

action would expire "before appellate review is completed"); *Weinstein*, 423 U.S. at 148 (evades review where the "'great majority'" of the challenged actions "'do not last long enough for complete judicial review of the controversies they engender'" (quoting *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-126 (1974)).

This Court originally announced the "capable of repetition, yet evading review" standard in a challenge to a two-year order. *Southern Pac. Terminal Co.*, 219 U.S. at 514-515. Since then, challenged conduct lasting two to three years or less has regularly been found to evade review. *E.g.*, *Wisconsin Dep't of Indus., Lab. & Hum. Relations* v. *Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (three-year debarment); *First Nat'l Bank of Boston*, 435 U.S. at 774 (eighteen-month referendum period); *Johnson* v. *Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (three-year labor agreement, despite remaining in effect for an additional two years after original three-year term); *Deja Vu of Nashville, Inc.* v. *Metropolitan Gov't of Nashville & Davidson County*, 274 F.3d 377, 390-391 (6th Cir. 2001) (two-year restriction on granting licenses following conviction); *see also Honeywell Int'l, Inc.* v. *NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) ("'orders of less than two years' duration'" presumptively evade review).

The 10-15 month contracts at issue in this case fall comfortably within these timeframes, and future contracts for which the same dispute will arise are likely to do so as well. The majority of government service contracts for which Kingdomware competes are for durations of approximately one year or less. Barton Decl. ¶ 9. Some of those contracts have options for one-year extensions at the discretion of the government, but even where those options are actually exercised, the total period is generally capped at no more than three

years. *Id.*[4] All of Kingdomware's bid protests after its amended complaint involved contracts with a base period of one year or less. *Id.*[5] Similarly, Kingdomware's recent contracts with other federal agencies have been for one year or shorter.[6] Finally, similar bid protests

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[4] The appropriate time period to consider is the "mandatory ... term" of the contract, at least when additional extensions are "solely within the control of the defendant." *Johnson*, 623 F.3d at 1019 (dispute over mandatory three-year agreement not moot despite remaining in effect an additional two years); *see Doe* v. *Sullivan*, 938 F.2d 1370, 1376 (D.C. Cir. 1991) (R. Ginsburg, J.) (one-year consent waivers with possibility of renewal were too short to allow for full litigation because of their "generally short-term (one-year) character"); *cf. Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (defendant's voluntary conclusion of wrongful conduct does not moot case unless "'absolutely clear" it cannot "'reasonably be expected to recur'"). In any event, even when the options are exercised, the time periods in question remain well within the limits found to evade review.

[5] *See Kingdomware I*, 2012 WL 10245509, at *1 (protesting VA Award No. VA24612F4632); *Kingdomware II*, 2012 WL 6463498, at *1 (protesting VA Award No. VA255P657SC1615); *Kingdomware III*, 2013 WL 393193, at *2 (protesting September 28, 2012, award for emergency communication software for VA's Hines and other facilities). For the associated contract terms for each of these procurements, see, respectively: FPDS-NG, *Transaction Report for VA Award ID VA24612F4632* (July 31, 2012), https://www.fpds. gov/ezsearch/fpdsportal?q=VA24612F4632 (two-month award for "computer training" services); FPDS-NG, *Transaction Report for VA Award ID VA255P657SC1615* (Aug. 11, 2011), https://www.fpds.gov/ezsearch/fpdsportal?q=VA255P657SC1615 (award for "educational services" for one-year base contract term with option years); FPDS-NG, *Transaction Report for VA Award ID VA69D12F3663* (Sept. 28, 2012), https://www.fpds.gov/ezsearch/fpdsportal?q=VA69D12F3663 (one-year contract for emergency notification software for Hines facility).

[6] *See, e.g.*, FPDS-NG, *Transaction Report for HHS Award ID HHSN271201500128U* (Sept. 23, 2015), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201500128U (53-week contract

based on § 8127(d) by other veteran-owned small businesses have likewise involved contracts that would evade review, including one-time contracts to provide or install supplies.[7]

Short contract periods are typical for relatively small-value service contracts, in part because funds are appropriated annually. *See* 31 U.S.C. § 1341(a)(1)(B) (Antideficiency Act prohibition on contracts "before an appropriation is made"); 41 U.S.C. § 6301(a) (Adequacy of Appropriations Act). Short duration contracts also permit the agency to reassess and redefine its needs should they evolve in the future.

In light of these typical durations, it is highly unlikely that a future dispute between the government and Kingdomware—or indeed, any veteran-owned small business—over the correct interpretation of § 8127(d) could be considered by this Court before the underlying contract is fully performed. Over three and a half years have already passed since the effective date of the last contract at issue here, in March 2012.[8]

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for programming services for the NIH); FPDS-NG, *Transaction Report for HHS Award ID HHSN271201400201P* (Feb. 21, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=HHSN271201400201P (one-year contract effective for data management services for the NIH, followed by eight-month extension); FPDS-NG, *Transaction Report for Award ID W91CRB14F0017* (June 2, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=W91CRB14F0017 (proposed one-year contract for emergency notification services for the Army, with actual contract period of three months).

[7] *See, e.g.*, *Matter of Legatus6, LLC*, 2011 WL 7485203 (Comp. Gen. Dec. 5, 2011) (installation contracts for solar panels); *Matter of Aldevra*, 2012 WL 10245511 (Comp. Gen. Nov. 12, 2012) (contracts to deliver or install kitchen equipment).

[8] That contract included additional option years, which the VA did not apparently exercise. *Supra* p. 3.

2. Over 16 years have passed since Congress, recognizing that "[t]he United States has done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," endeavored to expand federal contracting opportunities for veteran-owned small businesses. Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234. Frustrated by the shortcomings of those initial legislative efforts, as well as a perceived "culture of indifference" among many contracting officers, Congress sought to make good on the United States' promise to promote contracting opportunities for veterans by enacting § 8127(d). H.R. Rep. No. 109-592, at 15-16 (2006).

Nine years later, the promise of § 8127 remains unfulfilled. Although the rationales have shifted, the end result has always been the VA's insistence that § 8127 does not apply to a large number of its procurements. That very real controversy touches on countless VA procurements each year and affects thousands of veteran small business owners and their families. These businesses are being deprived of the contracting opportunities Congress intended to set aside for them. Pet. Br. 53-55; Pet. Reply Br. 22. Each lost opportunity is a contract that cannot help to get a new veteran-owned business off the ground, to sustain and grow an existing business, or to serve as a springboard for contracting opportunities with other agencies.

The nation's service-disabled and veteran-owned small businesses urgently require an answer to the question presented. Litigation is expensive and uncertain and, for a variety of reasons, it will be difficult, if not impossible, for a service-disabled or veteran-owned

small business to put the present dispute before the Court ever again if this case is dismissed.[9]

CONCLUSION

There is a live controversy between the parties. The Court should exercise its jurisdiction and reverse the judgment below.

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[9] If the Court nonetheless concludes that the case is moot, the Federal Circuit's judgment should be vacated, and the case should be remanded with instructions to dismiss it as moot. *See Camreta* v. *Greene*, 131 S. Ct. 2020, 2035 (2011); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Otherwise, VA procurements would continue to be governed by an unreviewed interpretation of § 8127(d) that even the government does not defend. U.S. Br. 24-25, 50 n.10.

No. 14-916

DEC 1 - 2015

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

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ARGUMENT

The parties agree on the answers to both questions the Court directed them to address. First, the three specific contracts at issue in petitioner's amended complaint were fully performed by May 2013. Pet. Supp. Br. 2-5; U.S. Supp. Br. 2-4. Second, the case is not moot because the dispute between the parties about the proper application of 38 U.S.C. § 8127(d) is capable of repetition, while evading review. Pet. Supp. Br. 5-12; U.S. Supp. Br. 7-14. This Court's continuing jurisdiction over the case follows straightforwardly from settled precedent and the undisputed facts of the case.

Under those circumstances, there is no basis to entertain the government's alternative suggestion that the Court might remand to address mootness. *Contra* U.S. Supp. Br. 14-16. The government does not identify any further factual development that would be necessary or helpful in addressing mootness, nor any reason to think the Federal Circuit's views on mootness would assist the Court. Indeed, Kingdomware already "argued below that the case was not moot, on the ground that 'this continuing dispute is likely to evade review because such short contract terms do not provide sufficient time for the matter to be litigated fully.'" *Id.* 15 (quoting Pet. C.A. Br. 54). The fact that the "government did not contest the Federal Circuit's jurisdiction" (*id.*) and the Federal Circuit expressly concluded that it had jurisdiction without thinking the mootness issue warranted further discussion (Pet. App. 13a) reinforces that the question is not a close call.[1]

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[1] Although this Court has cautioned that judicial silence on jurisdictional issues "has no *precedential* effect," *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) (emphasis added), the Federal Circuit's silence on the mootness question here should not be mistaken for a

Since the parties agree that the case is not moot and the parties' shared conclusion on this point is dictated by precedent, it appears that the true objective of the government's alternative suggestion is to secure a remand that would permit the Federal Circuit "to reconsider the merits of petitioner's challenge ... in light of the briefing in this Court." U.S. Supp. Br. 15. In other words, what the government actually seeks in its alternative suggestion is an opportunity to try to "wash out ... disadvantageous positions it has embraced below." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting). That tactic should be rejected. The decision below is wrong and should be reversed on the merits, not merely vacated.

If the government is dissatisfied with the current posture of the case, it has no one to blame but itself. The panel majority did not invent its erroneous interpretation of § 8127(d) out of whole cloth. It was *the government* that urged the court to hold that § 8127(d)'s "for purposes of meeting the goals" clause has operative effect and renders § 8127(d)'s "shall award" language discretionary, not mandatory. *E.g.*, Resp. C.A. Br. 21 (arguing that "a mandatory set-aside

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failure to consider the issue. Courts routinely decline to produce written opinions on aspects of a case that have been considered but do not require discussion. *E.g.*, *Bernklau* v. *Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002) (courts need not issue "'a full written opinion on every issue raised'"); *United States* v. *Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) ("There is no requirement that a court specifically discuss every issue raised[.]"); *United States* v. *Patel*, 879 F.2d 292, 295 (7th Cir. 1989) ("the reviewing court is not obliged to devote scarce judicial resources to a written discussion" of "every issue raised by the appeal"). Here, the Federal Circuit majority held that it "ha[d] jurisdiction over the appeal" (Pet. App. 13a) after Kingdomware briefed the mootness issue. A remand to repeat that exercise would not be an efficient use of judicial resources.

[would] conflict with the goal-setting provision of the statute," and that the only "rational interpretation ... is that [VA] contracting officers retain the discretion to determine which procurements to set aside as needed to meet the Secretary's goals"). Likewise, it was *the government* that opposed Kingdomware's petition for rehearing en banc (and later its petition for a writ of certiorari) after the court of appeals adopted the government's "goals"-based interpretation.[2]

This Court has, on occasion, vacated and remanded for reconsideration in light of a confession of error by the Solicitor General—a practice that has been "the subject of substantial disagreement" among Members of the Court. Shapiro et al., *Supreme Court Practice* 347 (10th ed. 2013); *see, e.g.*, *Nunez* v. *United States*, 128 S. Ct. 2990, 2990-2991 (2008) (Scalia, J., dissenting); *Alvarado* v. *United States*, 497 U.S. 543, 545-546 (1990) (Rehnquist, C.J., dissenting). But what the government suggests as an alternative here would be several steps beyond that: a remand to address a mootness question that neither party disputes and that is not a close call, so that the government may attempt to persuade the court of appeals to substitute a new and equally flawed rationale for the one the government previously persuaded it to adopt.

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[2] Contrary to the government's suggestion (at 15), the Court of Federal Claims did not "focus[] on" the latest iteration of the government's argument, *i.e.*, that Federal Supply Schedule orders are not "contracts." That court instead adopted what was then the government's alternative argument, holding that § 8127(d) is ambiguous based on the statute's "goal-setting provisions." Pet. App. 62a. It then deferred to the preamble to the VA's rulemaking (*id.* 69a-71a), which does not rely on any putative distinction between contracts and orders (Reply Br. 18-19), and which does not warrant any form of deference (Pet. Br. 48-52).

Veterans continue to suffer irreparable harm each day that § 8127(d) is not applied as written. Remanding the case so that the government can pursue a new litigation strategy as part of a do-over in the Federal Circuit would only prolong that harm. The case is not moot because it squarely meets the "capable of repetition, yet evading review" standard. The Court should exercise jurisdiction and reverse the judgment below on the merits.

CONCLUSION

Petitioner respectfully requests that the Court restore this case to the argument calendar, hold that the case is not moot, and reverse the judgment below.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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SUPPLEMENTAL REPLY BRIEF
FOR THE UNITED STATES

The United States respectfully submits this supplemental reply brief in response to this Court's order of November 4, 2015. Petitioner and the United States agree that this case is not moot. U.S. Supp. Br. 1; Pet. Supp. Br. 1. In particular, performance of the three procurements at issue here was completed by May 2013, but the case is not moot because it falls within the narrow exception for cases that are capable of repetition, yet evading review. *Ibid.* "[T]he same scenario is likely—indeed, virtually certain—to repeat itself again and again in the future for contracts of comparably short duration." Pet. Supp. Br. 1. Petitioner's supplemental brief, however, makes certain assertions that warrant response.

1. Petitioner states that small businesses owned and controlled by veterans "are being deprived of the contracting opportunities Congress intended to set aside for them." Supp. Br. 13; see *ibid.* ("Each lost

opportunity is a contract that cannot help to get a new veteran-owned business off the ground."). But the question whether 38 U.S.C. 8127 applies when the Department of Veterans Affairs (VA) places Federal Supply Schedule (FSS) orders is the disputed issue in this case. For the reasons stated in the United States' merits brief, the VA's current contracting practices are faithful to Congress's intent.

Veteran-owned small businesses are not "being deprived of" the opportunity to compete for FSS orders, moreover, because they can obtain FSS contracts, and the VA encourages them to do so. J.A. 9. Indeed, the VA applies a substantive preference for veteran-owned small businesses in many FSS orders. See 48 C.F.R. 808.405-2, 815.304, 815.304-70 (2014). The VA also has discretion to limit competition for FSS orders to small businesses owned and controlled by service-disabled veterans, see 15 U.S.C. 644(r); 48 C.F.R. 8.405-5(a) (2014), thereby giving those businesses a further competitive advantage.

Veteran-owned small businesses frequently and successfully compete for FSS orders. "[I]n 2011, the VA used FSS contracts for 20% of its total [procurement] spending, and 13% of these FSS expenditures went" to veteran-owned small businesses. Pet. App. 4a. That 13% figure surpassed the Secretary's 12% goal for contracting with veteran-owned small businesses, *id.* at 9a, and far surpassed the government-wide goal for contracting with service-disabled veteran-owned small businesses, which was 3%. See Small Bus. Admin., *Government-Wide Performance:*

FY2011 Small Business Procurement Scorecard 1 (June 29, 2012).*

2. Petitioner asserts that it "continues to be affected by the VA's refusal to apply the Rule of Two *to* the FSS." Supp. Br. 9 (emphasis added). The meaning of that statement is unclear. Thus far, petitioner has argued that the VA must "apply § 8127(d)'s Rule of Two *before* ordering from FSS suppliers." Pet. Br. 22 (emphasis added); see *id.* at 28-29 ("VA contracting officers [must] consider veteran-owned small businesses first, before turning to other potential suppliers or the FSS system."). Applying Section 8127 at the outset of every procurement would prevent the VA from using the FSS whenever the Rule of Two is satisfied, even if the FSS order would have been placed with a veteran-owned small business. Instead, the VA would need to award a wholly new contract. See 48 C.F.R 19.502-5(a) (2014) (set-asides are performed using the procedures for awarding wholly new contracts on the open market). As set forth in the United States' merits brief, that position cannot be squared with decades of procurement laws and regulations—including other contracting preferences that have used the word "shall"—and would severely impair VA operations.

The statement quoted above could be read to argue that the VA can use the FSS but must apply the Rule of Two when choosing among FSS vendors. Any such contention would clearly be wrong. As the VA's regulations confirm, Section 8127(d) applies only when the VA solicits and awards new contracts, and thus is inapplicable when the agency chooses among FSS

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* https://www.sba.gov/sites/default/files/files/FY11%20Final%20Scorecard%20Government-Wide_2012-06-29.pdf.

vendors. See U.S. Br. 20-53. Congress instead expressly addressed FSS set-asides in 15 U.S.C. 644(r), which provides that "agencies may, at their discretion, * * * set aside orders placed against [FSS] contracts for small business concerns," including specifically for small businesses owned by service-disabled veterans. *Ibid.*; see 15 U.S.C. 644(g)(2)(A). The decision whether to use an FSS set-aside is committed to the contracting officer's discretion and does not involve application of the Rule of Two. See 15 U.S.C. 644(r); 48 C.F.R. 8.405-5 (2014) (procedures for setting aside FSS orders).

In any event, this case is not an appropriate vehicle for deciding whether the Rule of Two should apply when the VA places an FSS order and chooses among FSS vendors. See U.S. Br. 44 n.9. Although veteran-owned small businesses can become authorized FSS vendors for the relevant category of information-technology services, and although petitioner asserts that many such businesses have done so, see CFC Doc. 22, at 3 (Sept. 18, 2012), petitioner has not. *Ibid.* Petitioner's own FSS contract does not make petitioner an authorized vendor for the categories of services applicable to the three procurements at issue here. Supplies and services are categorized in each FSS schedule by "Special Item Number." See 48 C.F.R 8.401 (2014). For example, Schedule 70 (information technology) consists of dozens of Special Item Numbers, including category 132-32 (term software licenses), which was used here. CFC Doc. 22, at 3; see U.S. Br. 6. But petitioner "is not on schedule 70 category 132-32." CFC Doc. 22, at 3; see *id.* at 3 n.2. Accordingly, even if the VA had restricted competition for these orders to veteran-owned small businesses on the

FSS, petitioner "could not have benefitted from [the] FSS set-aside." U.S. Br. 44 n.9.

3. Petitioner correctly states that performance of the underlying order with Everbridge Inc. was in effect until May 2013. Pet. Supp. Br. 3; see U.S. Supp. Br. 3-4. But petitioner misinterprets public information (Supp. Br. 3, 12 n.8) as suggesting that the VA did not exercise an option on that contract. In fact, "[t]he VA exercised the first option," but only for a three-month period rather than for a full year. Decl. of Corydon Ford Heard III ¶ 8. In any event, it is undisputed that performance was completed in May 2013, and that the total period of performance (less than two years) is common in this context and too short to enable full judicial review. Accordingly, without an exception to mootness, the precise issue in this case would recur yet evade review.

* * * * *

For the foregoing reasons, this case is not moot. For the reasons set forth in the United States' merits brief, the judgment of the court of appeals should be affirmed. In the alternative, this Court could vacate the judgment below and remand the case to allow the court of appeals to address the mootness issue in the first instance.

Respectfully submitted.

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